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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-372

LAWRENCE MOSKOWITZ and MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

v.

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

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LAWRENCE MOSKOWITZ and MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

v.

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Appellee.

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OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of the State of New York, entered on May 4, 1978, affirming an order of the Supreme Court of the State of New York, County of Rockland, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeals of the State of New York is reported at 44 NY 2d 383, 406 NYS 2d 1. The opinion of the Supreme Court of the State of New York, County of Rockland, is reported at 92 Misc. 2d 495, 401 NYS 2d 398. (Both Decisions appended hereto App. "A" and "C").

JURISDICTION

This is an appeal from the final judgment of the highest court of the State of New York upholding the propriety of two state statutes whose validity had been questioned as being repugnant to the Constitution. The judgment of the Court of Appeals of the State of New York was entered on May 9, 1978, (App. "B") and Notice of Appeal was filed in the Supreme Court, Rockland County on May 15, 1978, (App. "D") the court then possessed of the Record. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

The New York statutes whose validity are drawn into question by this appeal are Executive Law Section 63(8) and CPLR Section 2305(c), both as recently amended and set forth below.

QUESTION PRESENTED

Does a State statute violate the Constitutional proscription against search and seizure without benefit of warrant and the prior judicial approval so contemplated when it provides that a Prosecutor may issue a non-judicial subpoena *duces tecum* made returnable at his office, and not before a Court or Grand Jury, and then further allows him to take actual physical possession of the items called for therein?

STATUTES INVOLVED

Executive Law §63(8)*

The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena

*Matter in italics is new; matter in brackets is old law which was omitted.

witnesses, compel their attendance, examine them under oath before himself or a magistrate and require [the production of] *that* any books, *records, documents* or papers [which he deems] relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.*

Civil Practice Law and Rules §2305(c)*

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material.***

STATEMENT

Appellant, Lawrence Moskowitz, is the Manager of Appellant Mountain View Home For Adults. The latter is a duly licensed private proprietary home for adults in the State of New York. It provides residential care facilities to adults who are both ambulatory and without serious medical problems.

*Matter in italics is new; matter in brackets is old law which was omitted.

Appellee, Charles J. Hynes, is a Deputy Attorney General of the State of New York, appointed by the Attorney General as Special Prosecutor for Nursing Homes, Health and Social Services. Executive Order No. 36, dated 2 August, 1976, of the Governor of the State of New York authorized the Attorney General to inquire into the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults in the State (App. E.) The Governor granted the subpoena powers contained in Executive Law Section 63(8) to the Attorney General or his deputy.

On October 7, 1977, Appellee issued a non-judicial subpoena *duces tecum* to Appellants (App. F). The subpoena stated its authority as Executive Law Section 63(8) of the State of New York and the enabling order of the Governor. The subpoena required production in the office of Appellee and not before any Court or Grand Jury various books and records of Appellant Mountain View Home For Adults. A schedule attached to the subpoena outlined 24 demanded items which were essentially all of Appellants operating records from inception thru December 31, 1976 (App. F).

Initial discussions between the parties eliminated the possibility of voluntary compliance and on November 4, 1977, Appellee moved for an order to compel compliance (pursuant to CPLR 2308(b)) before the Supreme Court of the State of New York, County of Rockland. Appellee, however, not only requested an order requiring Appellants to *produce* in his office the property called for, but also to surrender actual, physical *possession* to Appellee "for inspection, examination or audit" pursuant to the statutes challenged herein.

In opposing Appellee's motion for compliance, these two statutes (utilized to take possession of Appellants' property), were then challenged as being unconstitutional

in that they were violative of the Fourth Amendment proscription against unreasonable searches and seizures and were unconstitutionally vague. In support of the motion to compel compliance, Appellee had argued that several incidents occurring at the home *subsequent* to the time periods related in the subpoena justified the subpoena.

On December 8, 1977, after oral argument, the Supreme Court, Rockland County, granted Appellee's motion, finding the two statutes constitutional. *Hynes v. Moskowitz,* 92 Misc. 2d 495, 401 NYS 2d 398 (Sup. Ct., Rockland Co., 1977) (McNab, J.). The order compelling compliance directed the physical turn-over of the books and records no later than December 20, 1977 at 5 p.m.

Notice of Appeal (App. G) was duly filed to the New York State Court of Appeals on a direct appeal as of right on only constitutional grounds, pursuant to CPLR Section 5601(b), challenging *solely* the constitutionality of the new statutes under the Fourth and Fourteenth Amendments.

On December 20, 1977, prior to the scheduled turnover, the trial court granted a stay pending appeal pursuant to CPLR Section 5519(a)(4), said stay was further extended for the pendency of the appeal by the Court of Appeals on January 5, 1978. Pursuant to the designation of the trial court, the subpoenaed documents were deposited with the Rockland County Clerk during the appeal process.

On May 4, 1978, the Court of Appeals upheld the constitutionality of Executive Law Section 63(8) and CPLR Section 2305(c) affirming the order of the Supreme Court, Rockland Co., *Hynes v. Moskowitz,* 44 NY 2d 383, 406 NYS 2d 1 (1978) (Jasen, J.).

Notice of Appeal to this Court pursuant to 23 USC Section 1257(2) was filed with the Clerk of the Supreme Court, Rockland County on May 15, 1978, as the Court then possessed of the Record.

On May 9, 1978, the Chief Judge of the Court of Appeals of the State of New York granted a stay of the order of the Supreme Court, Rockland County, on consent of Appellee, to allow Appellants an opportunity to apply for a stay pending appeal to a Justice of this Court.*

On May 17, 1978, an application for a stay pending appeal was made to the Hon. Thurgood Marshall, Associate Justice of this Court and Circuit Justice for the Second Circuit. *Moskowitz v. Hynes,* A-973. The application was denied on May 22, 1978.

The time for docketing the within appeal was to have expired on August 2, 1978. On July 17, 1978, application for an extension of time to docket this appeal was made. On July 24, 1978, Mr. Justice Marshall granted the application, extending Appellants' time to docket the appeal up to and including September 1, 1978. *Moskowitz v. Hynes,* A-90 (App. H).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal bare *some* similarity to those raised by *Queens Nassau Nursing Home and Far Rockaway Nursing Home v. Charles J. Hynes,* an appeal from the New York State Court of Appeals docketed to this Court on August 3, 1978. Appellants in those cases had their constitutional claims adjudicated simultaneously with Appellant herein and the Court of Appeals decided all three cases in one opinion at 44 NY 2d 383, 406 NYS 2d 1 (1978). The cases differ, however, most notably, in that the Appellant in *Queens Nassau/Far Rockaway* had been served with subpoenas *duces tecum* issued by and returnable before a *Grand Jury* while Appellants' subpoenas were issued solely by Appellee, as an individual, and not

*An identical stay, i.e., until May 19, 1978, was later granted by the trial court justice as well.

on behalf of any Court or Grand Jury. In the *Queens Nassau/Far Rockaway* cases, the statute whose constitutionality was attached was Criminal Procedure Law (CPL) Section 610.25. That statute, passed simultaneously with CPLR 2305(c) and Executive Law Section 63(8) (as amended), provides that a *Grand Jury* shall have the right to possession of the materials it subpoenas pursuant to a subpoena *duces tecum* issued on its behalf.

The effect of the statutes questioned by this appeal is far-reaching and of critical importance to not only the State of New York, but to other jurisdictions as well. For the first time in any State, the Executive may by-pass the Judicial branch and authorize the seizure of personalty, without a prior showing of probable cause before the neutral and detached magistrate envisioned by the Fourth Amendment.* The Executive need not even rely on the judiciary for enforcement of these non-judicial writs.

Executive Law Section 63(8) provides that failure to obey will be met with the full penal sanctions of a Class A misdemeanor for which the witness would face a year's imprisonment. There is no facility available in the statutory scheme for any prior judicial showing. Any subsequent judicial approval is woefully inadequate and perfunctory, and is not a saving measure for Fourth Amendment purposes. Moreover, the standard used for any subsequent judicial approval is less than the Constitutional one of Probable Cause and only for purposes of extended possession.

The action of the Court of Appeals of the State of New York in upholding the constitutional validity of Executive Law Section 63(8) and CPLR Section 2305(c) puts the State on a collision course with the Fourth Amendment and the decisions of this Court. Moreover, that

*For further comparative study see Point 3, *infra.*

course is not shared by either Federal law or the law of the States. There is no State or Federal prosecutor who shares the unbridled power of the Appellee. The investigatory aspects not only within Appellee's jurisdiction, but the jurisdiction of the Attorney General of the State, is as unbordered and as wide as the imagination of the Executive. The use of these new subpoenas *duces tecum,* operating outside of the Fourth Amendment, will have national ramifications if other States and the Federal Government follow suit and allow seizure of personalty by the Executive to the custody of the Executive without prior judicial approval.

1. Pursuant to Executive Law Section 63(8), as amended, Appellee himself is empowered to issue subpoenas and "require" that any books, records, documents or papers relevant or material to the inquiry be turned over to his custody for "inspection, examination or audit" as provided for the CPLR Section 2305(c) and Executive Law Section 63(8). CPLR Section 2305(c) states that it is the right of the State to issue a subpoena *duces tecum,* and that upon issuance, it is the right of the governmental issuing party to take actual, physical possession of the material subpoenaed "for a period of time, and/or terms and conditions, as may reasonably be required for the inspection, examination or audit of the material." This power is personal to Appellee and is not comparable to the unique powers of the Grand Jury and its subpoena powers. CPLR Section 2305(c) (i-iii) offers suggested criteria for how long that possession should be. However, the Court of Appeals in this case specifically held that none of the standards contained therein applied to *prior* Judicial approval but only to the amount of time needed for retention subsequent to seizure. *Hynes v. Moskowitz,* 406 NYS 2d at 5.

Research has failed to disclose any precedent for New

York's new non-judicial subpoena *duces tecum,* either in this State's jurisprudence or in the jurisprudence of any other soverign. Under traditional law, a subpoena *duces tecum* was a predictable writ with calcuable, if not limited, powers. It was used to bring documents before the issuing party, in the custody of the witness, and to subject that property to the proper uses of proof, as in court. *Hale v. Henkel,* 201 US 43, 73-74, 80-81 (1906). In other than Grand Jury situations,* the law has been clear that a subpoena *duces tecum* does not transfer possession of the subpoenaed material, *e.g. Matter of Kelly,* 19 FRD 269 (SDNY, 1956). The power to take possession of the subpoenaed documents is *not* inherent within the subpoena *duces tecum* itself.

This was recognized by the New York State Court of Appeals in *Windsor Park Nursing Home v. Hynes,* 42 NY 2d 243, 247, 397 NYS 2d, 813 (1977). It was in direct response to *Windsor Park* that the Legislature of the State, less than two weeks later,** passed the amended statutes challenged herein. The statutes attempt to create a hybrid subpoena *duces tecum,* which brings with it the right to possession. This power is to be available only to the State and not to private litigants, who, it must be assumed, still must function with the traditional subpoena *duces tecum.*

This Court has consistently held that the Fourth Amendment is applicable to the traditional subpoena *duces tecum. Boyd v. US,* 116 US 616, (1886); *Oklahoma Press Publ. Co., v. Walling,* 327 US 186 (1946); *See v. City of Seattle,* 387 US 541 (1966). However, because the

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In Re Horowitz, 482 F2d 72, 75 (2d Cir., 1973), it must be recalled that the subpoena in question here is *not* a Grand Jury subpoena *duces tecum.*

**This has been described as one of the speediest legislative overrulings of a judicial determination in recorded history. *Bellacosa, Practice Commentary, McKinney's* CPL §610.25.

subpoena *duces tecum* does not transfer possession, the Fourth Amendment was only protective as to the *scope* of documents requested. *Hale v. Henkel, supra* at 76. The subpoena *duces tecum* had always stood for *production*—not *possession*—and this is where the law stood throughout the country until Executive Law Section 63(8) and CPLR §2305(c) was passed in New York. The well worn line of subpoena *duces tecum* cases are inapplicable to New York's hybrid for only that hybrid transfers possession and custody directly to the issuing governmental authority.

2. A seizure of property by the government may not be made without warrant and remain inoffensive to the Fourth Amendment. There need be no actual trespass to denote a search. *US v. District Court,* 407 US 297 (1971); *Katz v. U.S.,* 389 US 347 (1967); *Boyd v. U.S., supra* at 630. The analogy between this Court's first great Fourth Amendment case and the one at bar is not misplaced. In both cases, the writ utilized sought to transfer possession of property to the government. The onus to produce the property for seizure was placed upon the subpoenaed party while sanctions made the failure to produce costly, as a coercive enforcement measure. In the *Boyd* case, it was the forfeiture of the property sought while in the case at bar, it is the forfeiture of freedom through the use of penal sanctions. (Executive Law §63(8) makes failure to comply with the subpoena a Class A misdemeanor). In either case, no court-ordered enforcement was needed. Mr. Justice Bradley, writing for the Court, found the use of the writ for such a purpose, *i.e.,* to coerce production of personalty, violative of the Fourth Amendment, 116 US at 754.

The juxtaposition of *Boyd* with the case at bar is all the more critical with added realization that the material sought in *Boyd,* an invoice for English plate glass, was produced before the trial court pursuant to a *Court* order

under §5 of 18 Stat. at L. 186, the Customs Revenue Act of 1874. That act, quoted extensively in Mr. Justice Bradley's decision (116 US at 747) provided only for the *production*—not *possession,*—of items requested. This order which carefully tracked the explicit language of the statute, very specifically provided that, upon production of the "subpoenaed" material:

> "(T)hat said United States Attorney and his assistants and such persons as he shall designate shall be allowed *before the court,* and *under its direction* and in the *presence of the attorneys for claimants,* if they shall attend, to make examination of said invoice on paper and to take copies thereof; *but the claimants* or their agents or attorneys *shall leave,* subject to the order of the court, *the custody of such invoice or paper,* except pending such examination," 116 US at 747 (Emphasis supplied).

The above wording as to custody and examination before the court are taken almost verbatim from the statute itself. 18 Stat. at L. 187 (116 US at 747).

The statute in *Boyd,* which did *not* transfer custody and possession, was held as violative under the Fourth Amendment due to the coercion extant within it. As the head notes, written by Mr. Justice Bradley state:

> "(The Section) require(s) the defendant or claimant to *produce in court* his private books, invoices and papers *or else* the allegations of the attorney (that the goods are subject to forfeiture) (are) to be taken as confessed, . . ." 116 US 746. (Emphasis supplied)

In comparison with *Boyd,* the statutes in question herein are all the more glaring. They require not *mere* production of books and records before a court on a given day for inspection under its direction, but the delivery and surrender of custody to the subpoenaing party. Unlike the statute found unconstitutional in *Boyd,* custody is in the subpoenaing party and not in the owner. The coercion

utilized is not *mere* forfeiture but *criminal* prosecution. And, lastly, the entire process need not operate under a court's order, control or direction, but, due to the overhanging threat of criminal punishment, is *self-enforcing.* Therefore, even to a greater and more acute degree than *Boyd* the statutes challenged herein are designed to circumvent the Fourth Amendment and seek to do by indirection what Appellee could not accomplish by warrant—seize possession of Appellant's personal property.

3. Any attempt to find similar powers in the hands of other governmental writs, either Federal or State, will prove fruitless. New York's statute is unique. In a non-Grand Jury situation, where a subpoena is returnable in the issuing party's *office* and not before any tribunal, the transfer of custody can only be viewed as inimical to the Fourth Amendment.

Compare the powers of Federal prosecutors.

Under federal law it is only a *Grand Jury* which may take possession of documents subpoenaed under a subpoena *duces tecum. In Re: Horowitz,* 482 F.2d 72 (2nd Cir., 1973). Moreover, this is not an explicitly stated statutory power, but one which is implied. There is no federal rule which permits federal prosecutors *not* operating under the unique powers of the Grand Jury to take possession of documents called for under a subpoena. The only independent power of a federal prosecutor to even subpoena records is found in the Federal Rules of Criminal Procedure, Rule 17(c). Under that rule, only the Court may permit an inspection before *itself,* by *both* parties, either prior to trial or prior to their admission into evidence of documents subpoenaed. It is important to note that this scheme is *reciprocal,* available to either party equally, and entails no Sixth Amendment problems. This is not the case in the New York statutes, which, rather

than conforming themselves to federal law, create new law by allowing a prosecutor, in a non-reciprocal situation, to subpoena and take possession of the Court, without the order of the Court, for the extended periods of time.

Any reliance on the subpoena power of federal administrative agencies to show a similarity is also inappropriate. These agencies have limited jurisdiction and powers and the records which they may subpoena are solely within that context, to effectuate their regulatory powers. Appellee has no regulatory powers and is not an administrative agency, but, rather a special prosecutor, empowered to investigate an entire industry and prosecute criminal violations where found. The statutes challenged herein authorize the Appellee to take possession of *any* books and records that are subpoenaed, without regard to specificity or purpose to be used. The powers of the regulatory agencies, directly limited by legislative intent, cannot hope to be as broad and unstructured. Judge Jasen, of the New York State Court of Appeals, dissenting from the majority in *Heisler v. Hynes,* 42 NY 2d 243, 397 NYS 2d (1977) [and supporting the position of the Special Prosecutor in that case, *i.e.* that Grand Jurys may take possession of documents seized under a subpoena *duces tecum* without additional legislation], supports this Grand Jury distinction raised by Appellants herein:

> "The Court's decision is particularly unfortunate since the reasoning to support it overlooks the separate capacities for the Grand Jury which issued the *judicial* subpoena at issue, and, instead, fuses together, and thus blurs, important distinctions between the function of *Grand Jury* and *prosecutor." (Heisler, supra,* at 731 [emphasis supplied].
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> ***
>
> "The Court's opinion also reflects a misunderstanding of the nature of the Grand Jury process. The subpoena issued by the prosecutor, *on behalf of* the Grand Jury, is return-

able *before* the Grand Jury. It is the Grand Jury, and *not* the prosecutor, who would obtain possession of these records. To say that the order of the Appellate Division gives the prosecutor's books and records', as the majority puts it (p. 253, p. 729 of 397 NYS 2d . . .) is an inexplicable inaccuracy. The Grand Jury would be given possession of the records and the prosecutor's access to the records would be *controlled* by the members of the Grand Jury. *The fact that prosecutors generally have no right to discovery in criminal cases* (p. 253, p. 730 of 397 NYS 2d . . .) *is also relevant.* The Grand Jury has plenary investigatory power. Unlike the situation with *office* subpoenas issued by prosecutorial agencies of various kinds, where issues of relevancy is carefully considered . . . it has been authoritativley stated that the Grand Jury may even act on rumor or suspicion. [Cases omitted]. The cases hold that a subpoena *duces tecum* may not be used to ascertain the existence of evidence have no application to Grand Jury subpoenas. [Cases omitted]." *Heisler, supra,* at 733 [Emphasis supplied].

Judge Jasen, dissenting in a companion case to *Heisler, Windsor Park Nursing Home v. Hynes,* 42 NY 2d 243, 397 NYS 2d 723 (1977), which denied the right of Appellee, as opposed to a Grand Jury, to take possession of books and records under a subpoena *duces tecum,* dismissed Appellee's comparison to regulatory agencies and their subpoena powers as follows:

"The fact that, in several instances, the Legislature explicitly conferred upon established regulatory agencies the authority to audit the books and records of the enterprises to be regulated, is *scarcely relevant* to this case. *We do not deal here with regulatory agencies, whose jurisdiction is very limited,* but with the office of the Attorney General, and his power and duty to investigate into matters touching the public peace, safety and justice. *There are obvious differences between the statute authorizing exceptional investigation and statutes authorizing regulatory agencies to conduct positive audits." [Windsor Park, supra,* at 726]. [Emphasis supplied].

The decisions below relied on the unique powers of the Grand Jury and extended these powers to Appellee as representative of the Executive Branch of government.

While this was not only improper, it also placed New York State wholly outside of the mainstream of the applicable case law, which would allow possession of subpoenaed documents only by a prosecutor acting on behalf of, or in the manner of, a Grand Jury. *Cf., Marston's Inc. v. Straud,* 114 Ariz. 260 (1977), [Ariz. R.S. §21-427 only allow Attorney General to issue subpoenas in "matters cognizable to a State Grand Jury"].

The departure of New York from the traditional subpoena *duces tecum* and the substitution of the new subpoena *duces tecum* exceeds both Federal practice, the practice of the other states and the Constitution. As such, the statutes creating this new Executive issued, Executive enforced writ of seizure are unconstitutional.

The Court's recent decision in *Marshall v. Barlow's Inc.,* ____ US ____, 23 CrL 3029 (Slip. Op. No. 76-1163) (May 23, 1978) underscore the limits of legislative meddling with the Fourth Amendment. Even in the all-pervasive arena of OSHA regulation, inspections—permitted by statute—still require an appropriate warrant. Recognizing that the genesis of the Fourth Amendment was in a business context (23 CrL at 3030), Mr. Justice White discarded the contentions of the Secretary of Labor that all business within the ambit of OSHA were "closely regulated" industries under the Fourth Amendment exceptions carved out in *United States v. Biswell,* 406 US 311, 316 (1972) and *Colonnade Catering Corp. v. United States,* 397 US 72, 74.77 (1970), *id.* Speaking to the ques-

tion of inspection of documents required to be kept by statute (29 CFR §1903.3) the Court noted that:

> "It is the Secretary's position, *which we reject,* that an inspection of documents of this scope may be effected without warrant." *Marshall v. Barlow's, Inc.,* 23 CrL at 3033, fn. 22. (emphasis supplied)

The "inspection" of documents to be made in *Marshall v. Barlow's Inc., supra,* was on-premises, and the Court felt that such an inspection required a warrant. The "inspection, examination and audit" envisioned by Executive Law §63(8) and CPLR §2308(c) takes place *off* the premises, after the documents have been removed from the custody of their rightful owner. If the on-premises inspection demands a warrant, can the off-premises post-seizure inspection require any less? If the on-premises, non-custodial inspection requires an adminsitrative warrant supplying the requisite showing under *Camara v. Municipal Court,* 387 US 523, 538 (1967) ["that reasonable legislative inspections are satisfied with respect to a particular [establishment].' . . ." *Marshall v. Barlow's, Inc., supra* at 3032.] Then, perhaps, a full, probable cause showing should be required of Appellee, whose powers are both civil and criminal, and who seeks to take possession of the documents to be inspected and bring them back to his office.

It is submitted that the decision of the Court of Appeals of the State of New York has impermissably weakened the Fourth Amendment in that State by permitting seizures by the Executive outside of court direction and approval and through the use of penal coercion. By upholding the constitutionality of CPLR §2308(c) and Executive Law §63(8) the Court has extended the power of the Grand Jury directly to the Executive himself and transmitted the traditional subpoena *duces tecum* into an acknowledged hybrid which does not fit the prior deci-

sions revolving around subpoenas *duces tecum* decided by this Court. We believe that the questions presented by this appeal and the statutes involved are both unique and of substantial national importance.

Respectfully submitted,

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APPENDIX

APPENDIX A — Opinion of New York State Court of Appeals

44 N.Y.2d 383

In the Matter of Charles J. HYNES, as Deputy Attorney-General of the State of New York, Respondent,

v.

Laurence MOSKOWITZ et al., Appellants.

In the Matter of QUEENS NASSAU NURSING HOME et al., Appellants,

v.

Charles J. HYNES, as Deputy Attorney-General of the State of New York, Respondent.

In the Matter of FAR ROCKAWAY NURSING HOME et al., Appellants,

v.

Charles J. HYNES, as Deputy Attorney-General of the State of New York, Rspondent.

Court of Appeals of New York.

May 4, 1978.

Appeals were taken from orders of the Supreme Courts, Rockland and Queens Counties, 92 Misc.2d 495, 401 N.Y.S.2d 398, Duncan S. McNab and George J. Balbach, JJ., directing the production and surrender of certain books and records pursuant to a subpoena duces tecum and denying motions to quash grand jury subpoenas duces tecum relating to books and records of nursing homes. The Court of Appeals, Jasen, J., held, inter

alia, that statutes providing for limited retention of subpoenaed documents upon "good cause shown by the issuer" were not unconstitutionally vague.

Affirmed.

1. Witnesses — 16

Statutes providing for limited retention of subpoenaed documents upon "good cause shown by the issuer" were not unconstitutionally vague as requiring no court order in advance of issuance of subpoena but, instead, showing of "good cause" only upon challenge to possession of subpoenaed documents. CPL 610.25; CPL 2305(c); Executive Law §63, subd. 8.

2. Witnesses — 16

Person subject to nonjudicial subpoena duces tecum may challenge it in court if subpoena requires production of irrelevant or immaterial documents or is used as instrument of harassment; likewise, where subpoenaed person fails to comply with subpoena, issuer may move to compel compliance on showing that items sought to be subpoenaed have some relevancy and materiality to matter under investigation.

3. Witnesses—16

While showing of probable cause or probative evidence to suspect illicit activity need not be made in order to support nonjudicial subpoena duces tecum, evidence so scant that it does not legitimately raise issue of impropriety is not enough.

4. Searches and Seizures — 7(25)

Statutes providing for limited retention of subpoenaed documents upon "good cause shown by the

issuer" were not violative of Fourth Amendment proscription against unreasonable searches and seizures. CPL 610.25; CPLR 2305(c); Executive Law §63, subd. 8; U.S.C.A. Const. Amend. 4.

5. Grand Jury — 36

Statute providing for limited possession and retention by grand jury of subpoenaed records met with constitutional standards by providing adequate safeguards to insure that retention of subpoenaed documents served legitimate public purpose and was reasonable in its scope and duration; statute was likewise not open to criticism that it allowed district attorney to pervert function of grand jury. CPL 190.25, subd. 6, 610.25.

6. Witnesses — 16

Statutes providing for retention of documents acquired by office subpoena duces tecum issued by Attorney General were constitutional in that they promoted public interest and prescribed safeguards to insure that terms of retention would not unduly burden subpoenaed party. CPL 610.25; CPLR 2305(c); Executive Law §63, subd. 8.

Barry Ivan Slotnick and Jay L.T. Breakstone, New York City, for appellants in the first above-entitled proceeding.

Charles J. Hynes, Deputy Atty. Gen. (T. James Bryan and Frank J. Marine, New York City, of counsel), for respondent in the first above-entitled proceeding.

Marc D. Freedman and George S. Meissner, Brooklyn, for appellants in the second and third above-entitled proceedings.

Charles J. Hynes, Deputy Atty. Gen. (T. James Bryan and Frank J. Marine, New York City, of counsel), for respondent in the second and third above-entitled proceedings.

OPINION OF THE COURT

JASEN, Judge.

In these three cases involving Mountain View Home for Adults, Queens Nassau Nursing Home and Far Rockaway Nursing Home, all of which present substantially the same issues, direct appeals are taken on constitutional grounds from three separate orders of the Supreme Court.

The Mountain View Home appeal is taken from an order directing compliance with a subpoena duces tecum issued by respondent, the Special Prosecutor for Nursing Homes (Deputy Attorney-General), on October 7, 1977. The subpoena required in the production of various books and records of the home at the office of the Special Prosecutor. The schedule attached to the subpoena, detailing the specific items sought, included 24 general categories of books and records encompassing essentially all appellant's business records.

When it became apparent that appellant nursing home would not comply with the subpoena, the Special Prosecutor moved for an order to compel compliance pursuant to CPLR 2308 (subd. [b]). In addition to seeking production of the documents, the Special Prosecutor also sought "possession * * * [of the subpoenaed materials] for the inspection, examination or audit' " as authorized by subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd. [c]). Appellants' opposed the motion alleging that subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd. [c]) violate the Fourth Amendment proscription against unreasonable searches and seizures. The statutes were also challenged as being unconstitutionally vague, and it was further argued that compulsion to produce potentially incriminating evidence contravenes the constitutional right against self incrimination.

In support of the motion to compel compliance, the Special Prosecutor argued that several allegedly illicit activities conducted at the home justified both the investigation and the subpoena. The Special Prosecutor informed the court that a sexual abuse complaint had been lodged against a resident of the home, that a number of residents had been improperly transferred to the home, and that a civil action was pending against the home for improperly withholding funds.

After a hearing, Supreme Court directed that the subpoenaed books and records be delivered to the Special Prosecutor no later than 5 p.m. on December 20, 1977. Because of the pending appeal, a motion to stay enforcement of the subpoena has been granted, and the subpoenaed materials have been placed in the custody of the Clerk for the County of Rockland.

In the Queens Nassau Nursing Home case, direct appeal is taken on constitutional grounds from an order of Supreme Court, Queens County, denying appellant's motion to quash a Grand Jury subpoena duces tecum issued on August 1, 1977. Appellant contends that the statute authorizing the Grand Jury and the Special Prosecutor to retain the subpoenaed materials is unconstitutionally vague, violative of the Fourth Amendment proscription against unreasonable searches and seizures, and contrary to the purpose of the Grand Jury as a body immune to governmental interference and control.

Review of the history of this case is necessary to understand fully its posture. On November 1, 1976, a Queens County Grand Jury subpoena duces tecum was served on appellant Herman Greenbaum, a partner of Queens Nassau Nursing Home, commanding production of the books and records of the nursing home for 1973 to 1976. Greenbaum moved to quash the subpoena on the grounds that it violated his constitutional right against self

incrimination, that the subpoena was overbroad and that it had been served improperly. On November 5, 1976, the motion was denied.

Subsequently indicted on one count of conspiracy in the fourth degree and 22 counts of willful violation of the health laws, Greenbaum was arraigned on November 16, 1976. The indictment charged that Greenbaum had engaged in a scheme to obtain kickbacks from a vendor of the nursing home.

On December 2, 1976, Greenbaum appeared before the Grand Jury, and produced only some of the subpoenaed materials. An oral motion seeking return of the records was denied. This motion was renewed in writing. In denying the renewed motion, Supreme Court permitted Greenbaum to be present during examination of the records if he so desired, but on reargument the order was modified to disallow Greenbaum's presence during inspection.

Faced with Greenbaum's persistent refusal to comply with the subpoena, the Special Prosecutor moved to have Greenbaum held in contempt. Supreme Court, Queens County, withheld decision pending our determination of *Matter of Heisler v. Hynes,* 42 N.Y.2d 250, 397 N.Y.S.2d 727, 366 N.E.2d 817 and *Matter of Windsor Park Nursing Home v. Hynes,* 42 N.Y.2d 243, 397 N.Y.S.2d 723, 366 N.E.2d 813. The holding in those cases, forbidding the Special Prosecutor from retaining custody of the documents sought by a Grand Jury or officer subpoena duces tecum, absent statutory authority, prompted the Special Prosecutor to withdraw the contempt motion.

Shortly after the *Heisler* and *Windsor Park* decisions, the Legislature enacted CPL 610.25, which authorized limited possession and retention by the Special Prosecutor of materials subpoenaed by the Grand Jury. The Grand Jury subpoena duces tecum now challenged was issued on

August 1, 1977, pursuant to the newly enacted CPL 610.25. It required production of 17 categories of books and records of the home from 1973 to 1976. A motion to quash the subpoena on the ground that CPL 610.25 is unconstitutional was denied. Pending resolution of this appeal, the subpoenaed records have been impounded by the Supreme Court, Queens County.

In the Far Rockaway Nursing Home case, Laszlo Szanto, a partner in the nursing home, was served with a Grand Jury subpoena duces tecum on August 1, 1977, commanding production of books and records of the home for 1970 to 1976. A motion to quash the subpoena on grounds of unconstitutionality was denied by Supreme Court, Queens County.

The history of this case is similar to that of the Queens Nassau Nursing Home cae. In October of 1976, a Grand Jury subpoena duces tecum was issued to Szanto commanding production of the home's books and records. Szanto moved to quash the subpoena, asserting his constitutional right against self incrimination. He also alleged that the subpoena was overbroad, and was served improperly. On November 5, 1976, the motion was denied.

On November 12, 1976, Szanto was indicted on one count of conspiracy in the fourth degree and 14 counts of willful violation of the health laws. As was the case with Greenbaum, Zanto was charged with involvement in a kickback scheme.

Because Szanto refused to comply with the subpoena, the Special Prosecutor moved to hold him in contempt. Supreme Court, Queens County, ordered that Szanto would be held in contempt if he failed to comply with the subpoena by June 7, 1977. The *Heisler* and *Windsor Park* decisions, however, prompted the withdrawal of the contempt motion.

Passage of CPL 610.25 led to the issuance of the presently challenged Grand Jury subpoena duces tecum. Denying appellants' motion to quash, Supreme Court, Queens County, held the statute constitutional, and ordered that the subpoenaed documents be placed in the custody of the Supreme Court, Queens County. However, most of the documents have not been delivered to the court due to an alleged burglary at Far Rockaway Nursing Home which allegedly occurred on June 6, 1977.

Before proceeding to the various constitutional arguments raised against the three challenged statutes, a general overview of these provisions will be instructive. CPL 610.25[2] provides that were a subpoena duces tecum is issued upon reasonable notice to the subpoenaed party, "Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury." The reasonableness, duration and conditions of such possession shall be determined by the court with consideration for, among other things, the "good cause" shown by the issuing party, the rights and legitimate needs of the subpoenaed person, and the feasibility and appropriateness of copying the subpoenaed material.

Subdivision 8 of section 63 of the Executive Law[3] empowers the Attorney-General to issue office subpoenas duces tecum and to possess and retain subpoenaed materials in accordance with the provisions of the CPLR. In language nearly identical to that of CPL 610.25, CPLR 2305 (subd. [c])[4] provides the bounds of reasonable possession and retention of subpoenaed documents.

On the present appeal, in Queens Nassau and Far Rockaway, CPL 610.25 is challenged as being unconstitutionally vague in violation of the constitutional right to due process of law in that the statute fails to define what is meant by the phrase, "good cause shown by the party issuing the subpoena", and that the statute fails to specify

whether "good cause" must be shown prior to the issuance of the subpoena or only upon challenge to the possession of the subpoenaed documents. The same vagueness argument is raised in Mountain View, attacking the constitutionality of CPLR 2305 (subd. [c]) and subdivision 8 of section 63 of the Executive Law. Because CPL 610.25 and CPLR 2305 (subd. [c]) are cast in nearly identical language, challenges that they are unconstitutionaly vague will be considered together.

[1] We conclude that the statutes are not unconstitutionally vague in either respect. A reading of the statutes quickly dispels the slightest trace of ambiguity. We believe the phrase "good cause shown by the issuer", as it appears in the statutes, means precisely what it says — good reason to be shown by the issuer why the possession required by the subpoena should be continued for a reasonable time. It does not refer to something which the issuer must show the court *before* a subpoena is issued, but, rather, it refers to one factor "among other things" to be considered by the court in determining a challenge by the subpoenaed party *after* the subpoena is issued as to the extent of possession to which the issuer of the subpoena is entitled.[5] Good cause means, then, a sufficient justification to possess the subpoenaed documents for a reasonable period of time in conjunction with the pending investigation. Indeed it would be anomalous to require an in-court showing of good cause for possession prior to issuance since the very validity of the subpoena need not be demonstrated in court before the subpoena issues.

And if more need be said, reference to the legislative history conclusively establishes the intended statutory meaning. The intent behind the new law was explained as follows: "[F]or the first time in New York law the witness whose records are subpoenaed will have some specific statutory safeguards to assert, to limit the prosecutor's

power and to protect the witness' rights in terms of possession and in terms of the times and conditions of that possession".

"[T]here could be recourse in the courts either on a motion to compel or a motion to quash or modify * * * *No court order is required though in advance*". (Emphasis added.) (Statement made before State Assembly, Richard Gottfried, Chairman of the Assembly Codes Committee.)

[2,3] We would also observe that the statutes do not affect the law as it existed prior to their enactment with respect to the obligation of a person served with a non-judicial subpoena duces tecum. A person subject to a non-judicial subpoena duces tecum may challenge it in court if the subpoena requires the production of irrelevant or immaterial documents (*Carlisle v. Bennett,* 268 N.Y. 212, 197 N.E. 220), or is used as an instrument of harassment (*Matter of A'Hearn v. Committee on Unlawful Practice of Law of N.Y. County Lawyers' Assn.,* 23 N.Y.2d 916, 298 N.Y.S.2d 315, 246 N.E.2d 166 cert. den. 395 U.S. 959, 89 S.Ct. 2099, 23 L.Ed.2d 745). Likewise, where the subpoenaed person fails to comply with the subpoena, the issuer may move to compel compliance. On such a motion, the issuer must show that the items sought to be subpoenaed "have some relevancy and materiality to the matter under investigation". *(Carlisle v. Bennett, supra,* 268 N.Y. at p. 218, 197 N.E. at p. 222; *Matter of La Belle Creole Int., S.A. v. Attorney-General of State of N.Y.,* 10 N.Y.2d 192, 196, 219 N.Y.S.2d 1, 4, 176 N.E.2d 705, 707.) While a showing of probable cause or probative evidence to suspect illicit activity need not be shown to support a subpoena, evidence so scant that it does not legitimately raise an issue of impropriety is not enough. (*Myerson v. Lentini Moving & Storage Co.,* 33 N.Y.2d 250, 256, 351 N.Y.S.2d 687, 692, 306 N.E.2d 804, 807.) Bifurcation of the power, on the one hand, of the public

official to issue subpoenas duces tecum and, on the other hand, of the courts to enforce them, is an inherent protection against abuse of subpoena power. The statutes challenged as vague in these cases do not alter these well-settled principles in any way, for they speak only to the right and duration of possession of subpoenaed documents, and not to the validity of the subpoenas.

[4] It is further argued by appellants that the challenged statutes are violative of the Fourth Amendment proscription against unreasonable searches and seizures in authorizing the seizure and retention of subpoenaed materials without a showing of probable cause. We find this argument unpersuasive. Unlike searches and seizures, where a preliminary showing of probable cause is required before a warrant may issue, a Grand Jury is not saddled with such a requirement in issuing a subpoena duces tecum. To do so would assuredly impede its broad investigative powers to determine whether a crime has been committed and who has committed it. All that is required under the State and Federal Constitutions is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome. (*Myerson v. Lentini Moving & Stor. Co.,* 33 N.Y.2d 250, 351 N.Y.S.2d 687, 306 N.E.2d 804, *supra*' *Matter of Horowitz,* 2 Cir., 482 F.2d 72, 75-79, cert. den. 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86.)

This constitutional guarantee seeks to balance the interests of society in discovering evidence of criminal activity with the right of the individual to be free from unjustifiable governmental intrusions. To be sure, an intrusion imposed on a person subject to a search and seizure is substantial. A search is conducted without advance notice and the scene of the search may be an individual's home. Where resistance is encountered, the search may be ef-

fected by the threat or use of force. These considerations demand that a warrant issue only if supported by probable cause.

But these considerations do not apply with equal force to the Grand Jury subpoena duces tecum. (*Hale v. Henkel,* 201 U.S. 43, 76, 26 S.Ct. 370, 50 L.Ed. 652.) It is served in the same manner as any other legal process, and may be challenged, before compliance, in a motion to quash. (*Matter of Manning v. Valente,* 272 App. Div. 358, 72 N.Y.S.2d 88, aff'd 297 N.Y. 681, 77 N.E.2d 3; *United States v. Doe [Schwartz], 2 Cir., 457 F.2d 895, 898, cert. den. 410 U.S. 941, 93 S.Ct. 1376, 35 L.Ed.2d 608.) If the motion to quash is denied and compliance ordered, no search is conducted, nor is there a threat or actual use of force. (Matter of B. T. Prods. v. Barr,* 44 N.YH.2d 226, 405 N.Y.S.2d 9, 376 N.E.2d 171.) Rather, the materials sought are furnished by the subpoenaed person himself at a time and place prescsribed by the court. It should also be noted that a search warrant, unlike the subpoena, is not a preliminary investigatory tool, but is rather a device for obtaining evidence intended to be used against a defendant where probative support of his guilt is already known to the authorities. Clearly, the concerns which require that constitutional protections attach when a warrant issues to not apply equally when an investigatory subpoena duces tecum is served. Hence, "a subpoena to appear before a grand jury is not a 'seizure' in the [constitutional] sense, even though that summons may be inconvenient or burdensome." (*United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 769, 35 L.Ed.2 67.)

It is also noteworthy that the challenged subpoenas seek the production of business records and not personal papers. The applicability of the State and Federal Constitutions which protect personal papers from unreasonable searches and seizures has been questioned

where a subpoena seeks those types of business records concerning which there is no serious expectation of privacy. (E.g., *United States v. Miller,* 425 U.S. 435, 445, 96 S.Ct. 1619, 48 L.Ed.2d 71.) This is particularly true of records of a business subject to governmental control or license.

[5] Turning to the challenged statute, CPL 610.25, which goes beyond the mere authorization of Grand Jury subpoenas by providing for the limited possession and retention of the subpoenaed records by the issuer, consideration must be given to whether the statute provides adequate safeguards to insure that the retention of subpoenaed items serves a legitimate public purpose and is reasonable in its scope and duration. (*Robert Hawthorne, Inc. v. Director of Internal Revenue,* D.C., 406, F.Supp. 1098, 1106.) That the challenged statute serves a legitimate public purpose in facilitating the Grand Jury to conduct investigations is clear. But to allow the Grand Jury to possess subpoenaed records indefinitely or to possess documents not needed for investigative purposes might well signal a violation of constitutional standards. The challenged statute safeguards against such abuses providing that "[t]he reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence." These guidelines set the bounds of reasonableness regarding the conditions and duration of the retention of subpoenaed materials. The Grand Jury is not given unchecked power to hold subpoenaed records indefinitely. On a motion to limit the possession of subpoenaed materials, the reasonableness of the terms and duration of possession

will be determined by the court. Hence, we believe such statutory safeguards comply with constitutional requirements. They help insure the smooth and uninterrupted functioning of the Grand Jury, while limiting the intrusion borne by those who are the subject of investigation.

Moreover, appellants' contention that CPL 610.25 allows the District Attorney to pervert the function of the Grand Jury is also without merit. It is true, as appellants urge, that one of the purposes of the Grand Jury is to provide a buffer between the prosecutor and the criminal suspect. Thus, the issuance of indictments by the Grand Jury must be made independently. The Grand Jury, however, is also an investigator. (CPL 190.25, subd. 6.) To discharge its responsibility of criminal investigation most effectively, the Grand Jury must act in close cooperation with the District Attorney. So long as the subpoenaed materials relate to a legitimate Grand Jury investigation, it would defy common sense to deprive the District Attorney access to them.

[6] By like reasoning, subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd. [c]), which provide for the retention of documents acquired by an office subpoena issued by the Attorney-General, must also be held constitutional. As is true of the Grand Jury subpoena duces tecum, the office subpoena duces tecum imposes only a minor infringement on one's expectation of privacy. Thus, we conclude that the same relatively relaxed constitutional standards as were applied to CPL 610.25 be applied in testing the validity of subdivision 8 of section 63 of the Executive Law and CPLR 2305 (subd. [c]). (*Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 195, 66 S.Ct. 494, 90 L.Ed. 614.) Our inquiry is, therefore, limited to whether these statutes promote the public

interest and prescribe sufficient safeguards that the terms of retention will not unduly burden the subpoenaed party.

That the attorney-general serves a vital public purpose is beyond doubt; he is given broad investigatory responsibilities in matters of public safety and welfare. We have already concluded that investigation into the rampant corruption in nursing homes is a proper exercise of this authority. (*Matter of Sigety v. Hynes,* 38 N.YH.2d 260, 379 N.Y.S.2d 724, 342 N.E.2d 518, cert. den. 425 U.S. 974, 96 S.Ct. 2174, 48 L.Ed.2d 798.) To facilitate his effectiveness in carrying out such investigations, the Legislature has granted the Attorney-General the power to issue subpoenas, and to retain custody of the subpoenaed materials within the bounds of reasonableness.

While the duration and terms of retention must, of course, comport with constitutional standards, we are satisfied that CPLR 2305 & subd. [c]) meets these standards for it provides precisely the same detailed guidelines as does CPL 610.25 to assure that the retention of the subpoenaed documents will be supported by good cause and will be limited to a reasonable period of time. In addition, the statute provides that the needs of the subpoenaed party be considered to assure that the possession of the subpoenaed records by the Attorney-General will not prove unduly onerous to the subpoenaed party. The Constitution demands no more.

Accordingly, the orders of Supreme Court, Queens County, and Supreme Court, Rockland County, should be affirmed, with costs.

BREITEL, C.J., and GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

In each case: Order affirmed, with costs.

FOOTNOTES

1. Laurence Moskowitz, Manager of Mountain View Nursing Home, was also served with a subpoena and is a party in this proceeding.

2. CPL 610.25, effective July 19, 1977, provides as follows:

"Securing attendance of witness by subpoena; possession of physical evidence.

"1. Where a subpoena duces tecum is issued on reasonable notice to the person subpoenaed, the court or grand jury shall have the right to possession of the subpoenaed evidence. Such evidence may be retained by the court, grand jury or district attorney on behalf of the grand jury.

"2. The possession shall be for a period of time, and on terms and conditions, as may reasonably be required for the action or proceeding. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (a) the good cause shown by the party issuing the subpoena or in whose behalf the subpoena is issued, (b) the rights and legitimate needs of the person subpoenaed and (c) the feasibility and appropriateness of making copies of the evidence. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice."

3. Amended subdivision 8 of section 63 of the Executive Law, effective July 19, 1977, provides: "8. *** The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any *books, records, documents or papers* relevant or material to the inquiry be turned *over to him for inspection, examination or audit, pursuant to the civil practice law and rules.* If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor."

4. Effective July 19, 1977, subdivision (c) was added to CPLR 2305. The new subdivision provides in pertinent part: "(c) Inspection,

examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material."

5. The Practice Commentary regarding CPL 610.25 relates the legislative purpose of the challenged provisions.

"This amendment is part of an integrated package involving CPLR 2305, Penal Law §215.70, Executive Law § 63, subdivision 8 and CPL § 190.25.

"It was sought by the Attorney General and the Special Prosecutor for Nursing Homes in order to offset and effectively overrule *Matter of Heisler v. Hynes,* 42 N.Y.2d 250 [397 N.Y.S. 2d 727, 366 N.E.2d 817] and *Matter of Windsor Park Nursing Home v. Hynes,* 42 N.Y.2d 243 [397 N.Y.S.2d 723, 366 N.E.2d 813] decided by the Court of Appeals on July 7, 1977, reargument denied, 42 N.Y.2d [1015] [398 N.Y.S.2d 1034, 368 N.E.2d 289], September 9, 1977.

"In what has to be one of the speediest legislative overrulings of a judicial determination in recorded history, these amendments were approved as law and became effective on July 19, 1977.

"The net purpose, assuming constitutionality of the new legislative package is to permit the subpoenaing agency to retain in its possession books, documents and records for examination and audit.

"The length of time and the terms and conditions for retention are set forth in the statute and a practical balance is sought to be struck between the good cause shown by the subpoenaer and the rights and needs of the subpoenaed including feasibility of reproduction with all costs to be borne by the subpoenaed unless the Court determines otherwise in the interest of justice." (Bellacosa, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL 610.25.)

APPENDIX B
ORDER REMITTEUR WITH ENTRY

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Charles D. Breitel, Chief Judge, Presiding

Sup. Ct. No. 198
In the Matter of Charles J. Hynes,
Deputy Attorney General,

Respondent,

vs.

Laurence Moskowitz et al.,

Appellants.

The Appellant(s) in the above entitled appeal appeared by Barry Ivan Slotnick; the respondent appeared by Charles J. Hynes, Deputy Attorney General.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Jasen, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Rockland County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Entered May 9, 1978 2:30 P.M.

s/Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 4, 1978

APPENDIX C—DECISION OF SUPREME COURT ROCKLAND COUNTY

In the Matter of Charles J. HYNES

v.

Lawrence MOSKOWITZ and Mountain View Home for Adults.

Supreme Court, Rockland County.

Dec. 8, 1977.

Special state prosecutor for nursing homes filed motion for an order mandating and directing home for adults to comply with subpoena duces tecum requiring home to surrender its records for purposes of inspection, examination or audit. Adult home by way of an affirmation in opposition opposed the motion. The Supreme Court, Rockland County, Duncan S. McNab, J., held that: (1) turnover and surrender of records of home for adults to special prosecutor for examination and audit was not unconstitutional as violative of home's Fourth and Fifth Amendment rights and that (2) good cause existed to support issuance of instant subpoena.

Prosecutor's motion granted.

1. Witnesses—298

Turnover and surrender of records of home for adults to special state prosecutor for nursing homes for examination and audit, pursuant to office subpoena duces tecum, was not unconstitutional as violative of home's Fifth Amendment rights. U.S.C.A. Const. Amend. 5; CPLR 2305; Executive Law §63, subd. 8.

2. Constitutional Law—48(1)

There is a strong presumption that a statute duly enacted by Legislature is constitutional.

3. Constitutional Law—48(3)

In order to declare a law unconstitutional, invalidity of law must be demonsrated by person attacking it beyond reasonable doubt.

4. Witnesses—16

Subpoena duces ecum issued upon home for adults and calling for production of documents covering 24 general headings and requiring surrender of possession of such documents to special prosecutor for nursing homes for purposes of inspection, examination or audit was not constitutionally infirm on grounds of overbreadth or unreasonableness. Executive Law §63, subd. 8.

5. Witnesses—16

Search warrant cannot be equated with a subpoena duces tecum; there are distinctions between a seizure of evidence and obtaining of evidence pursuant to court orders authorized by law and made after adequate opportunity to present objections.

6. Witnesses—16

Executive Law provision stating that Attorney General is empowered to subpoena witnesses and require that relevant books and records be turned over to him for inspection, examination or audit pursuant to Civil Pracice Law must be read in conjunction with provision of Civil Practice Law requiring court to make determination whether issuing party has good cause to demand surrender of requested records. CPLR 2305(c); Executive Law §63, subd. 8.

7. Searches and Seizures—7(25)

Surrender of records of home for adults to special state prosecutor for nursing homes for purposes of inspection, examination or audit, pursuant to office subpoena duces tecum, was not tantamount to an unjustified search and seizure and thus unconstitutional, as violative of Fourth Amendment, in light of statutory requirement that court make determination whether issuing party in fact had good cause to demand surrender of requested records. U.S.C.A.Const. Amend. 4; CPLR 2305, 2305(c); Executive Law §63, subd. 8.

8. Witnesses—16

Unlike a search warrant, a subpoena duces tecum need not rest on a showing of probable cause to sustain its issuance nor even a strong and probative basis for investigation; all that is required is that basis for its issuance be more than isolated or rare complaints by disgruntled individuals.

9. Witnesses—16

Specific instances of alleged wrongdoing at home for adults including, inter alia, sexual abuse of child by resident and police department's frequent response to complaints about home including purported arson, possible drug overdose and a death at home established good cause to support issuance of office subpoena duces tecum requiring home for adults to surrender its books and records to special state prosecutor for nursing homes for purposes of inspection, examination or audit. CPLR 2305(c); Executive Law §63, subd. 8.

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Asst. Atty. Gen. Allen Mincho, Pearl River, for petitioner Hynes.

Barry Ivan Slotnick by Jay L.T. Breakstone, New York City, of counsel, for respondent Moskowitz.

DECISION AND ORDER ON MOTION FOR COMPLIANCE

DUNCAN S. McNAB, Judge.

Petitioner herein, the Special State Prosecutor for Nursing Homes, has moved pursuant to CPLR §2308(b) for an order mandating and directing compliance with a certain subpoena duces tecum issued upon the respondent Home for Adults on October 7, 1977, which subpoena calls for production of a wide variety of respondent's books and records; and that upon production, the named respondents surrender possession of said records to the Office of the Special Prosecutor for purposes of inspection, examination or audit. While respondents have not chosen to cross-move to quash the instant subpoena, they are by way of an affirmation in opposition, opposing the motion of the Special Prosecutor on grounds that the turnover and surrender of records to the Special Prosecutor for examination and audit as permitted via recent amendments to CPLR §2305 and Executive Law §63(8), eff. July 19, 1977 (see 1977 Session Laws, Chapter 451) would be unconstitutional as violative of respondent's Fourth and Fifth Amendment rights.

At the threshold, the Court would note that the Court of Appeals, in the seminal case of *Friedman v. Hi-Li Manor Home for Adults, et al.*, 42 N.Y.2d 408, 397 N.Y.S.2d 967, 366 N.E.2d 1322, decided July 7, 1977, has approved the procedural posture adopted by respondents herein of awaiting the institution of proceedings to compel compliance and then for the first time raising objection. Thus, there would seem to be no infirmity in, nor does the Special Prosecutor raise objection to, the present procedural posture of the instant case; the Court would thereby go directly to the merits of defendant's substantive claims.

THE FIFTH AMENDMENT ISSUE

[1] Initially, it is undisputed that the subpoena in question herein was issued pursuant to the authority granted the Deputy Attorney General [i.e., the Office of the Special Prosecutor] by Executive Order No. 36, dated August 2, 1976 and Executive Law §63(8). In *Friedman v. Hi-Li Manor Home for Adults,* supra, the Court of Appeals held that "the Deputy Attorney General had authority by the issuance of an office subpoena duces tecum under subdivision 8 of section 63 of the Executive Law to compel the production of books and records of private proprietary homes for adults." In so holding, the Court of Appeals relied heavily on its previous holding in *Matter of Sigety v. Hynes,* 38 N.Y.2d 260, 379 N.Y.S.2d 724, 342 N.E.2d 518 (1975) wherein the subpoena power of the Special Prosecutor under Executive Law §63(8) was upheld in an ongoing investigation of the nursing home industry. Noting the "close similarity" of adult homes to nursing homes, including the infusion of public moneys into both types of institutions and the fact that both are subject to state regulation and supervision, the *Friedman* Court affirmed lower court orders denying motions to quash the office subpoenas served therein. Of more immediate import herein, however, the *Friedman* Court went beyond the issue of *authority* for the issuance of the subpoena to specifically reject the further contention that enforcement of the subpoenas would violate constitutional protections against compulsory self-incrimination. J. Jones, speaking for the majority in *Friedman,* supra (J. Cooke concurring in a separate opinion in which Jasen and Gabrielli, JJ., concur), clearly stated that "the proposition that a P.P.H.A. is such a 'private enclave' (wherein the privilege could be raised, see *Bellis v. U.S.,* 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 [1973]) is negated beyond peradventure by the statutory command

to the Board of Social Welfare to 'visit and inspect, from time to time, and maintain a general supervision' of such homes [Executive Law §750, subd. 1(a)]; the grant of power to representatives of the board of 'full access to the . . . books and papers relating to such institution' [id. subd. 3] . . . and the required compliance in operation of such a home with the rules of the board [Executive Law §758, subd. 3(e)] cf. *Davis v. U.S.,* 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946)]." Contrary to respondent's assertion, then, it would seem crystal clear that the *Friedman* Court placed *adult homes* squarely under the "required records" exception to the Fifth Amendment initially enunciated with respect to nursing homes in *Sigety,* supra (emphasis added) and see *Shapiro v. U.S.,* 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1947); accordingly, respondent herein has no Fifth Amendment objection to raise upon production of the books and records being sought. (Compare *Andreson v. Maryland,* 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) wherein the U.S. Supreme Court noted that the "Fifth Amendment may protect an *individual* from complying with a subpoena for the production of *his personal records* in his possession (but not from a seizure of the same materials by law enforcement officers pursuant to a search warrant) because the very act of production may constitute a compulsory authentication of incriminating information" in the context of a search of an attorney's law office pursuant to state warrant, as opposed to the subpoena served in the instant case upon a facility subject to extensive state regulation.)

The Court turns then to the separate issue of whether surrender of respondent's books and records pursuant to the above-noted recently enacted amendments to Executive Law §63(8) and CPLR §2305 would be unconstitutional as tantamount to an unreasonable search and search

in violation of the Fourth and Fourteenth Amendments.

By way of preface, it is significant to note that both of these amendments were enacted less than two weeks after the Court of Appeals ruled in *Matter of Windsor Park Home v. Hynes,* 42 N.Y.2d 243, 397 N.Y.S.2d 723, 366 N.E.2d 813, and *Heisler v. Hynes,* 42 N.YU.2d 250, 397 N.Y.S.2d 727, 366 N.E.2d 817, both decided July 7, 1977, that while the Special Prosecutor *could require production* of a party's records either at his office or before the grand jury, such a right to production did not carry with it an accompanying right to *retain possession* of the records for independent examination via the issuance of an office subpoena duces tecum or grand jury subpoena duces tecum, respectively (absent proper application for an order of impoundment).

As amended, eff. July 19, 1977, CPLR §2305 reads as follows:

> "Attendance required pursuant to subpoena; possession of books, records, documents or papers.
>
> (c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. THe cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice."

Also effective July 19, 1977, Executive Law §63(8) as amended, and in pertinent part, reads as follows:

> "The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require [the production of] that any books, records, documents or papers [which he deems] relevant or material to the inquiry be turned over to him for inspection, examiantion or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor."[1]

Significantly, the Court of Appeals in *Heisler,* supra, left open the very question raised herein in commenting: "if our legislature had intended . . . a subpoena duces tecum to compel a witness to surrender possession of books and records for audit and examination, *if that be constitutionally valid,* it is to be assumed that it would have done so expressly." (emphasis added)

[2,3] Proceeding from that background, and now confronted by such an express legislative enactment, it is well-settled that "there is a strong presumption that a statute duly enacted by the Legislature is constitutional, and that in order to declare a law unconstitutional, the invalidity of the law must be demonstrated by the person attacking it beyond a reasonable doubt. *People v. Berck,* 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411 (1973); citing *People v. Pagnotta,* 25 N.Y.2d 333, 337, 305 N.Y.S.2d 484, 487, 253 N.E.2d 202, 205 (1969) and *Matter of Van Berkel v. Power,* 16 N.Y.2d 37, 40, 261 N.Y.S.2d 876, 878, 209 N.E.2d 539, 541 (1965), wherein the Court

of Appeals further held that Legislative enactments should be struck down "only as a last unavoidable result." Moreover, it has been held that "a lower court, as distinguished from a court having appellate jurisdiction, should not declare a statute in contravention of the law of the State unless it is "unreasonable, arbitrary and the conclusion of unconstitutionality is inescapable." *People v. Esteves,* 85 Misc.2d 217, 378 N.Y.S.2d 920, Crim.Ct. Kings County, 976 (Brown, J.); *People v. Barrera et al.,* NYLJ, 2/20/76, pg. 8, cols. 1 & 2, Sup.Ct.N.Y.Co. (Leff, J.). This Court feels that in the instant case respondent has failed to meet this burden.

[4] First, respondent alludes in his opposing papers to the fact that the subpoena calls for production and surrender of "a multitude of documents covering some twenty four general headings." The Court would again refer to the *Hi-Li Manor* case, supra, wherein the Court of Appeals stated that the office subpoena duces tecum therein, in calling for the production of "voluminous books and records" may have reached, but did not exceed, the permissible limits of the reach of an office subpoena, and was not overbroad; similarly, in an as yet unreported decision from the Southern District of New York, J. Robert Carter, in the case of *Roseman et al v. Hynes,* dated November 9, 1977, rejected a constitutional challenge to a very similar subpoena duces tecum served on an adult home pursuant to Executive Law §63(8), holding that the subpoena itself was not constitutionally infirm on grounds of overbreath or unreasonableness. Certainly then, the instant subpoena must be seen as withstanding any challenge on this ground.

More significant however, is respondent's Fourth Amendment contention that the requested surrender of the books and records herein, "upon the mere signature of the Special Prosecutor", would be tantamount to an unjustified search and seizure, not pursuant to search warrant and absent any showing of probable cause.

[5-7] In the first instance, this Court would not equate a search warrant with a subpoena duces tecum; it is well-settled that there are distinctions between a seizure of evidence and the obtaining of evidence "pursuant to orders of court authorized by law and made after adequate opportunity to present objections." See *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 195, 66 S.Ct. 494, 498, 90 L.Ed. 614 (1946); *In re Horowitz,* 482 F.2d 72, 75 (2nd Circuit 1973); and see *Andreson v. Maryland,* supra. Yet, this Court might well have agreed with respondent's due process argument with regard to the "indispensable condition" of interposing a neutral and detached magistrate between law enforcement agents and the individual citizen had Executive Law §63(8), as amended, merely stated that "the attorney general or his deputy . . . is empowered to subpoena witnesses . . . and require the production of any books and records . . . *which he deems relevant or material* . . . be turned over to him for inspection, examination, or audit." (emphasis added). And see *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1967). However, such is not the case. Executive Law §63(8), as amended, specifically deletes the phrase "which he deems" relevant and only permits the turnover of books and records to the deputy attorney general *pursuant* to *the CPLR* (emphasis added). Thus, Executive Law §63(8) must be read in conjunction with CPLR §2305, which, as amended, provides, in pertinent part:

> "The issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and condi-

tions shall be determined with consideration for, among other things,

(i) the *good cause* shown by the issuing party

(ii) the rights and needs of the person subpoenaed, and

(iii) the feasibility and appropriateness of making copies of the material." (emphasis added)

Thus, the explicit language of CPLR §2305(c) provides that the issuing party shall have the right to possession for a reasonable time upon a showing of good cause; in other words, this statute requires the Court to make the determination whether the issuing party in fact has good cause to demand a surrender of the requested records. Such a requirement satisfies the fundamental dues process issue raised by respondent; that is, it interposes the determination of a neutral and detached magistrate between the deputy attorney general and the objecting party. A similar statutory requirement, i.e. refusing to produce a book or paper without reasonable cause, has in the past saved a legislative enactment from constitutional attack. See *Matter of Barnes v. Bayne et al.,* 204 N.Y. 108, 97 N.E. 508 (1912), wherein the contempt provisions of section 856 of the then Code of Civil Procedure were found to satisfy due process of law and upheld as constitutionally valid; and compare *People v. Berck,* supra, wherein the loitering provision contained in Penal Law §240.35(6) was found to be unconstitutionally vague for failing to require a showing of probable cause to arrest, "[thereby] plac[ing] virtually unfettered discretion in the hands of the police."

[8] Having thus determined that Executive Law §63(8) and CPLR §2305, as amended, pass constitutional muster when read in conjunction, the question that remains is what is "good cause" in the context of a turnover pursuant to subpoena duces tecum, and has the Special Prosecutor established such good cause to the Court's satisfaction herein. Unlike a search warrant, a subpoena

duces tecum need not rest on a showing of probable cause to sustain its issuance nor even a "strong and probative basis for investigation"; all that is required is that "the basis for its issuance be more than isolated or rare complaints by disgruntled [individuals]"; phrased differently, a mere general averment of wrongdoing would not suffice, nor would mere "shadowy complaints and surmise." *Myerson v. Lentini Bros. Moving & Storage Co., Inc.,* 33 N.Y. 250, 351 N.Y.S.2 687, 306 N.E.2d 804 (1973). This Court has previously held in a case involving a health-related facility, that "to meet this relatively minimal standard" (that the records sought bear a reasonable relationship to the subject matter under investigation and the public purpose to be served) the agency asserting this subpoena power must show its authority, the relevancy of the items sought, and some [articulable, factual] basis for *inquisitorial action." Fishkill Health Related Facility v. Hynes,* NYLJ 10/6/77, pg. 12, col. (Sup. Ct. Rockland Co., published under Sup. Court, Westchester County) citing *Myerson v. Lentini Bros.,* supra, in turn citing *Matter of A'Hearn v. Comm. on Unlawful Practice of Law of New York County Lawyer's Association,* 23 N.Y.2d 916, 298 N.Y.S.2d 315, 246 N.E.2d 166 (1969); and see also *Windsor Park Nursing Home v. Hynes,* supra.

Initially, since the authority of the Special Prosecutor to subpoena books and records has been extended to private proprietary homes for adults as well as those of nursing homes and health-related facilities under Executive Law §63(8), (see Friedman v. Hi-Li Manor Hme, et al, supra) and since the items being sought assuredly are relevant to the Special Prosecutor's inquiry, this Court can see no reason not to apply the "factual basis" test of *Fishkill* to P.P.H.A.'s as well. And, unlike the case in *Fishkill,* supra, where this Court granted a motion to quash a subpoena duces tecum upon the Special Pro-

secutor's candid concession that he had *no* particular information of any wrongdoing at that facility, here the Special Prosecutor has represented to the Court a wide range of specific instances of alleged wrongdoing, including the following:

That on May 29, 1977, a resident of the Mt. View Home sexually abused a three year old girl in the nearby Village of Haverstraw, New York, and that in the months preceding June 6, 1977, the Haverstraw Police Department had frequently been called to respondent's facility concerning a variety of other complaints, including, but not limited to a reported larceny, a possible drug overdose, and an apparent D.O.A. on respondent's premises, all of which are reflected in the official records of the Haverstraw Police Department, furnished to the Court as Exhibit B; that on February 1, 1977, in defiance of the instructions of the then regulatory Board of Social welfare,[2] Mr. Jacob Rosenbaum, a partner in the Mt. View Home, improperly transferred some thirty residents of an adult home which had been ordered closed in Brooklyn to his facility, all thirty being released mental patients, without making the medical and financial records of these transferees available to the Department of Social Services as required by law; that on November 18, 1977, J. Edward O'Gorman, sitting in Supreme Court, Rockland County, in an unreported case entitled *Andres & Lang v. Mt. View Home for Adults, Jacob Rosenbaum and Larry Moskowitz,* enjoined and restrained the named respondents from continuing to hold plaintiff Lang's social security and SSI checks unless and until plaintiff were to authorize the respondents, in writing, to exercise control over her checks; additionally, per the affirmation of Special Assistant Attorney General Allen Mincho dated December 1, 1977, it is averred that representatives of the North Rockland Outreach Center, (a unit of the Depart-

ment of Mental Hygiene) have alleged that portions of residents' social security checks, reserved for the personal use of residents, are now being retained by Mr. View in violation of applicable state and federal regulations.[3]

[9] Without any question, the sum total of this information more than provides the required factual basis necessary to establish the requisite "good cause" under CPLR §2305 and to support the issuance of the instant subpoena duces tecum upon respondent.

Accordingly, it is hereby ordered, pursuant to CPLR §2308(b), that the Special Prosecutor's motion be granted and that, by no later than 5:00 p.m., Tuesday, December 20, 1977, the named respondents are directed to comply with the subpoena issued on October 7, 1977, by producing and turning over to the Special Prosecutor for inspection, examination or audit those books and records requested, for such time as would be reasonably required for inspection, examination and audit; it is further ordered, however, that the Special Prosecutor's request to impose $50.00 costs, pursuant to CPLR §2308(b), is hereby denied.

FOOTNOTES

1. Language contained in bracketed sections deleted upon amendment of July 19, 1977.

2. The Special Prosecutor has represented to the Court that the job of regulating adult homes has since been entrusted to the Department of Social Services.

3. The Special Prosecutor also avers that on January 12, 1976, a resident of rspondent's facility, then known as Hi-Tor Manor Home for Adults, died of starvation, which incident ultimately led a Rockland County grand jury to conclude, by way of Grand Jury Report, that the facility was guilty of neglect; however, since this incident occurred prior to the facility's acquiring its present name, and since it appears that the composition of the partnership managing the respondent home has been altered, due in part to the death of a former partner, since this alleged incident, it will not be considered herein in determining the merits of the Special Prosecutor's motion for compliance.

APPENDIX D
NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

In the Matter of CHARLES J. HYNES,
Deputy Attorney General,

Respondent,

-against-

LAURENCE A. MOSKOWITZ, et al.,

Appellants.

Notice is hereby given that LAURENCE MOSKOWITZ and MOUNTAINVIEW HOME FOR ADULTS, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, affirming an order directing compliance with a subpoena *duces tecum* issued by Respondent, entered in this action on May 4, 1978.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

s/Barry Ivan Slotnick
BARRY IVAN SLOTNICK
Counsel for Appellants
233 Broadway
New York, New York 10007
212 964-3200

TO: Charles J. Hynes, Esq.
Deputy Attorney General
270 Broadway
New York, New York 10007
Attn: T. James Bryan, Esq.
Special Asst. Attorney General

APPENDIX E
EXECUTIVE ORDER NO. 36

EXECUTIVE ORDER NO. 36

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE
OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

WHEREAS, the treatment and care of elderly citizens in private proprietary homes for adults, and the management and operation of such facilities are matters concerning the public peace, public safety and public justice of the State of New York; and

WHEREAS, the compensation for that treatment and care is derived in part from public funds, and the State of New York is responsible for licensing and supervising such facilities; and

WHEREAS, there have been numerous allegations of violations of law and mistreatment of residents in such facilities; and

WHEREAS, the New York State Board of Social Welfare has requested you to investigate and prosecute the alleged commission of indictable offenses relating to private proprietary homes for adults, pursuant to subdivision 3 of Section 63 of the Executive Law, and you have designated Special Deputy Attorney General Charles J. Hynes to act in these matters; and

WHEREAS, Special Deputy Attorney General Charles J. Hynes has requested that I authorize an inquiry into private proprietary homes for adults, pursuant to subdivision 8 of Section 63 of the Executive Law, and has advised me that such an inquiry would be in the public interest;

NOW, THEREFORE, pursuant to subdivision 8 of Section 63 of the Executive Law, and in view of the request of Special Deputy Attorney General Charles J. Hynes, I find that the public interest requires that I direct you to inquire into all matters concerning the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults, or any principal, operator, agent, supplier or other person connected therewith; and I direct you to do so in person or by your deputy to have the power set forth in said subdivision 8 for the purpose of this requirement.

GIVEN under my hand and the Privy Seal of the State of the Capitol in the City of Albany this second day of August in the year of our Lord one thousand nine hundred seventy-six.

BY THE GOVERNOR
s/Hugh L Carey

Secretary to the Governor
s/David Burke

APPENDIX F
SUBPOENA DUCES TECUM

SUBPOENA FOR A WITNESS TO ATTEND BEFORE THE DEPUTY ATTORNEY GENERAL

To: Any Officer or Agent of the Mountainview Home for Adults of 1 South Route 9W, Haverstraw, N.Y.

YOU ARE HEREBY COMMANDED TO APPEAR BEFORE CHARLES J. HYNES, Deputy General of the State of New York (Special Prosecutor) on the 20th day of October, 1977, at 10:00 o'clock in the forenoon, at the office of the Deputy Attorney General, 10th floor, One Blue Hill Plaza, Pearl River, N.Y. as a witness in an inquiry into nursing homes, care centers, health facilities and related entities located in the State of New York being conducted by the Deputy Attorney General pursuant to Section 63(8) of the Executive Law of the State of New York and the Executive Order of Governor Hugh Carey dated 7 February 1975.

YOU ARE FURTHER COMMANDED to bring with you at the above time and place the books and records as per Schedule A attached of the Mountainview Home for Adults and any predecessor in operation of the same facility from date of opening up to and including the 31st day of December, 1976.

A failure to attend without reasonable cause is punishable as a misdemeanor pursuant to section 63(8) of the Executive Law.

Dated: October 7, 1977

Charles J. Hynes
Deputy Attorney General

by: s/Robert R. Meehan
Robert R. Meehan
Special Assistant Attorney General
Tel.: (914)735-9100

This subpoena requires your attendance at the date and time indicated, you do not have to answer any questions or surrender possession of any documents if you believe that to do so would violate your rights under the constitutions of the United States of New York State.

If you are in doubt as to the extent of your rights, you should consult with an attorney who may appear with you on the return date of this subpoena.

Attention is called to section 73 of the Civil Rights Law, a copy of which is printed on the reverse side of this subpoena.

SCHEDULE A

1. General Ledger
2. Cash receipts journal, disbursement journal and register.
3. Purchase journal, supporting vouchers, purchase orders and release orders.
4. All invoices for goods and services ordered plus receiving reports or similar evidence of actual receipt.
5. Petty cash book, petty cash vouchers and summary.
6. General journal and all adjusting entries.
7. Subsidiary records for loans payable and receivable and related documents, such as notes, loan agreements and mortgages.
8. Accounts payable subsidiary ledger.
9. Accounts receivable subsidiary ledger.
10. All bank statements, bank reconciliations, cancelled checks, check stubs and voucher copies.
11. All leases, rental agreements and contracts.
12. All accounting work papers and schedules.
13. All asset account journals, depreciation schedules and property schedules.
14. All payroll records including subsidiary payroll ledger, time cards, W-2 forms and withholding schedules.
15. Personnel files for all employees—prior and current.
16. All forms and reports submitted to New York State and the federal government.
17. All business correspondence.
18. Federal payroll forms 940 and forms 941.
19. All Federal and State tax returns.
20. All insurance records, certificates, agreements and correspondence.
21. All depreciation schedules.
22. All Stock Record and Transfer books.
23. Corporation papers.
24. List of Corporate officers and Stockholders.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF ROCKLAND)

James S. Johnson being dul sworn deposes and says:

I am an agent and employee of CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor), and I am not a party to this action or proceeding.

On the 7th day of October, 1977, I served the annexed subpoena upon Laurence C. Moskowitz by delivering to and leaving with said person a copy of the same at premises located at Mountainview HA ISO Rte. 9W Haverstown.

The description of the person whom I served is as follows: sex: male; skin color: white; hair color: brown; approximate age: 35; approximate weight: 140; approximate height: 5'7''; other identifying features: glasses.

s/James S. Johnson

Sworn to
October 12th, 1977

APPENDIX G
NOTICE OF APPEAL TO THE NEW YORK STATE COURT OF APPEALS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCCKLAND

IN THE MATTER OF HYNES

-against-

MOSKOWITZ and MOUNTAIN VIEW HOME FOR ADULTS

Respondents/Appellants.

SIRS:

PLEASE TAKE NOTICE that the Plaintiff, relying solely upon the question involving the validity of Chapter 451 of the Laws of 1977, under the provisions of Section 12 of Article I of the Constitution of the State of New York, hereby appeals as of right, to the Court of Appeals of the State of New York, from an order made by Honorable Duncan S. McNab, Supreme Court Justice (Acting), on December 8, 1977, and entered in the office of the Clerk of the County of Rockland on December 8, 1977, directing the production and surrender of certain books and records to Petitioner pursuant to a certain subpoena *duces tecum,* and from each and every part of the order, and the whole thereof.

Yours, etc.,

BARRY IVAN SLOTNICK
Attorney for Respondents/Appellants
233 Broadway
New York, New York 10007
964-3200

TO: CHARLES J. HYNES, ESQ.
Deputy Attorney General
Attorney for Petitioner/Respondent
One Blue Hill Plaza
Pearl River, New York 10965
Attn: Allen Mincho, Esq.

APPENDIX H
ORDER EXTENDING TIME TO DOCKET

SUPREME COURT OF THE UNITED STATES
NO. A-90

LAURENCE MOSKOWITZ, ET AL.,

Appellants,

v.

CHARLES J. HYNES

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including September 1, 1978.

s/Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of July, 1978

Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-372

LAWRENCE MOSKOWITZ and
MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM THE ORDER OF THE COURT OF APPEALS

CHARLES J. HYNES
Deputy Attorney General
State of New York
Appellee Pro Se
270 Broadway
New York, New York 10007
(212) 488-5281

T. JAMES BRYAN
Special Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Supreme Court of the United States

October Term, 1978

No.

LAWRENCE MOSKOWITZ and
MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM THE ORDER OF THE COURT OF APPEALS

Statement

This is an appeal from an order of the Court of Appeals of the State of New York, entered on May 4, 1978, which affirmed an order of the Supreme Court, Rockland County, entered December 8, 1977. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383 (1978). The Supreme Court of Rockland County (MCNAB, J.) had granted a motion brought by the

Deputy Attorney General to compel compliance with a subpoena duces tecum issued by the Deputy Attorney General pursuant to Section 63(8) of the Executive Law. *Matter of Hynes* v. *Moskowitz,* 92 Misc.2d 495 (Rockland Co. 1977). This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the order of the Court of Appeals.

Introduction

Section 63(8) of the Executive Law of the State of New York [McKinney's Consolidated Laws, Vol. 18] provides that:

> Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. * * * The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry.

Pursuant to this statute, On August 2, 1976, Governor Hugh Carey issued Executive Order No. 36 addressed to Attorney General Louis Lefkowitz. This order states:

> WHEREAS, the treatment and care of elderly citizens in private proprietary homes for adults, and the management and operation of such facilities are matters concerning the public peace, public safety and public justice of the State of New York; and

> WHEREAS, the compensation for that treatment and care is derived in part from public funds, and the State of New York is responsible for licensing and supervising such facilities; and
>
> WHEREAS, there have been numerous allegations of violations of law and mistreatment of residents in such facilities; and
>
> WHEREAS, the New York State Board of Social Welfare has requested you to investigate and prosecute the alleged commission of indictable offenses relating to private proprietary homes for adults, pursuant to subdivision 3 of Section 63 of the Executive Law, and you have designated Special Deputy Attorney General Charles J. Hynes to act in these matters; and
>
> WHEREAS, Special Deputy Attorney General Charles J. Hynes has requested that I authorize an inquiry into private proprietary homes for adults, pursuant to subdivision 8 of Section 63 of the Executive Law, and had advised me that such an inquiry would be in the public interest;
>
> NOW, THEREFORE, pursuant to subdivision 8 of Section 63 of the Executive Law, and in view of the request of Special Deputy Attorney General Charles J. Hynes, I find that the public interest requires that I direct you to inquire into all matters concerning the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults, or any principal, operator, agent, supplier or other person connected therewith; and I direct you to do so in person or by your deputy to have the powers set forth in subdivision 8 for the purpose of this requirement.

9 N.Y.C.R.R. §3.36.

On October 7, 1977, a subpoena duces tecum was issued by the Deputy Attorney General, pursuant to Section 63(8), to the Mountain View Home for Adults commanding any officer or agent of the home to bring the books and records of the home to the office of the Deputy Attorney General on December 21, 1976. On the same day, this subpoena was served upon the appellant, Lawrence Moskowitz.

Moskowitz made no motion to quash the subpoena and did not comply with it.

The Deputy Attorney General then moved, pursuant to Section 2308(b) of the New York State Civil Practice Law and Rules (CPLR) [McKinney's Consolidated Laws of New York, Vol. 7B] for an order compelling the appellants to comply with the subpoena.

The appellants resisted this motion on the ground that Section 63(8) of the Executive Law and Section 2305 of the CPLR, as amended by Chapter 451 of the Laws of 1977, unconstitutionally authorize the Deputy Attorney General to retain possession of subpoenaed materials for examination and audit.

The appellants also asked the court to quash the subpoena on the ground that it was issued without any justification as part of a "fishing expedition," and on the ground that production of the records would violate the appellants' Fifth Amendment privilege against self-incrimination.

In a decision and order dated December 8, 1977, Justice McNab granted the motion to compel compliance, rejecting the appellants' arguments about the constitutionality of

Section 63(8) of the Executive Law and Section 2305 of the CPLR. The court also rejected the appellants' Fifth Amendment argument and their claim that there was no basis for issuance of the subpoena. The court found that the facts provided by the Deputy Attorney General were sufficient to justify issuance of the subpoena:

> [T]he Special Prosecutor has represented to the court a wide range of specific instances of alleged wrongdoing, including the following:
>
> That on May 29, 1977, a resident of the Mt. View Home sexually abused a three-year-old girl in the nearby Village of Haverstraw, New York, and that in the months preceding June 6, 1977, the Haverstraw Police Department had frequently been called to respondent's facility concerning a variety of other complaints, including, but not limited to a reported larceny, a possible drug overdose, and an apparent D.O.A. on respondent's premises, all of which are reflected in the official records of the Haverstraw Police Department, furnished to the court as Exhibit B; that on February 1, 1977, in defiance of the instructions of the then regulatory Board of Social Welfare, Mr. Jacob Rosenbaum, a partner in the Mt. View Home, improperly transferred some 30 residents of an adult home which had been ordered closed in Brooklyn to his facility, all 30 being released mental patients, without making the medical and financial records of these transferees avaliable to the Department of Social Services as required by law; that on November 18, 1977, Judge Edward O'Gorman, sitting in Supreme Court, Rockland County, in a case entitled *Andres* v. *Mountainview Home for Adults* (92 Misc 2d 136), enjoined and restrained the named respondents from continuing to hold plainitff Lang's Social Security and SSI checks unless and until plaintiff were to authorize the respondents, in writing, to exercise control over her checks;

> additionally, per the affirmation of Special Assistant Attorney-General Allen Mincho dated December 1, 1977, it is averred that representatives of the North Rockland Outreach Center (a unit of the Department of Mental Hygiene) have alleged that portions of residents' Social Security checks, reserved for the personal use of residents, are now being retained by Mt. View in violation of applicable State and Federal regulations.

Matter of Hynes v. *Moskowitz,* 92 Misc. 2d 495, 504 (Rockland Co. 1977.

The court, therefore, directed appellants to produce the subpoenaed records at the office of the Deputy Attorney General. The order and decision of the court were entered on December 8, 1977. Thereafter, upon a motion by the appellants, the court modified its order to direct that the subpoenaed records be produced at the office of the County Clerk to be maintained there while the appellants appealed to the Court of Appeals. On January 5, 1978, the Court of Appeals granted the appellants' motion for a stay of the subpoena pending appeal to that court.

The appellants, pursuant to CPLR 5601(b)(2), appealed this order directly to the Court of Appeals solely on the ground that the statutes involved were unconstitutional. In a decision and order dated May 4, 1978, the Court of Appeals unanimously affirmed the lower court's decision. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383 (1978).

The appellants then sought a stay of the subpoena from Mr. Justice MARSHALL pending appeal to this Court. This application was denied on May 19, 1978. Thereafter, the Deputy Attorney General obtained the subpoenaed records from the Rockland County Clerk.

Statutes Involved

Section 2305(c) of the CPLR, which was added by Chapter 451 of the Laws of 1977, provides:

> (c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

Chapter 451 of the Laws of 1977 also amended Section 63(8) of the Executive Law by adding the material in italics indicated below:

> The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any books, *records, documents* or papers relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.*

POINT I

The appellants have complied with the subpoena duces tecum whose validity they challenged. Therefore, their appeal should be dismissed as moot.

The appellants challenged the lawfulness of a subpoena duces tecum issued by the Deputy Attorney General on the ground that, under state law, this subpoena would permit the Deputy Attorney General to obtain possession of the subpoenaed material for a reasonable period of time for the purpose of his inquiry into the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults. CPLR 2305(c). They claimed that this right to possess the subpoenaed materials, without a showing of probable cause, violated the Fourth Amendment. The Court of Appeals disagreed, affirming the lower court decision directing compliance with the subpoena. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 406 N.Y.S.2d 1 (1978). The appellants then sought to obtain a stay from Mr. Justice MARSHALL of this Court. That application was denied on May 19, 1978. Thereafter, the Deputy Attorney General obtained the subpoenaed books and records from the County Clerk of Rockland County, who had been holding them pending this litigation.

On this appeal, the appellants seek to have the Court of Appeals' decision directing compliance with the subpoena reversed. Since the subpoena has already been complied with, this relief would not restore the parties to the *status quo ante.* Therefore, the appellants' appeal should be dismissed as moot. *Cf. Defunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The arguments made by the appellants in their appeal do not present a substantial federal question. Therefore, their appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

The New York statutory scheme, which the appellants challenge, is not violative of any of the appellants' constitutional rights.

Under New York law, the Governor may, if he finds that the public peace, safety and justice require, request that the Attorney General conduct any inquiry into a matter of grave concern to the state. This authority, contained in Section 63(8) of the Executive Law, is for the purpose of advising the Governor so that he may perform his executive functions. *Matter of Sigety* v. *Hynes,* 38 N.Y.2d 260, 266 (1975); *Matter of DiBrizzi* (*Proskauer*), 303 N.Y. 206, 215-16 (1951). As stated by the Court in *DiBrizzi, supra*:

> The power here attacked is akin to that right of the Legislature to investigate and to subpoena and examine witnesses to the end of safeguarding public interests by appropriate legislation and which is so well established as to have passed beyond the realm of controversy. (*People ex rel. McDonald* v. *Keeler,* 99 N.Y. 463.)'' Thus, the only question here presented is whether the investigation directed by the Governor can reasonably be said to be for the purpose of securing information to advise him in his executive function.

One of the functions of the Governor of the State of New York is, by virtue of the State Constitution, to recom-

mend legislation. N.Y. State Constitution, Art. IV, §3 [McKinney's Consolidated Laws of New York, Vol. 2]. Therefore, the Court of Appeals' correlation of the function of a legislative subpoena and the function of an executive, 63(8) subpoena has more than analogical significance. This Court has repeatedly recognized the right of legislative commitees to obtain information for the purpose of a legitimate legislative function. *Eastland* v. *United States Serviceman's Fund*, 421 U.S. 491 (1975); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Sinclair* v. *United States*, 279 U.S. 263 (1929); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927).

The Governor directed the Attorney General to conduct an inquiry into the "administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults" because "the compensation for the treatment and care is derived in part from public funds, and the State of New York is responsible for licensing and supervising such facilities; and * * * there have been numerous allegations of violations of law and mistreatment of residents in such facilities * * *." 9 N.Y.C.R.R. 3.36. Section 63(8) of the Executive Law requires that the Attorney General make weekly reports to the Governor about the progress of this investigation.

The subpoena challenged by the appellants in this case was issued to Lawrence Moskowitz, the sole proprietor and owner of the Mountain View Home for Adults for specified books and records of this private proprietary adult home.

The appellants claim in their jurisdictional statement that: "The statutes challenged herein authorize the Appellee to take possession of *any* books and records that are subpoenaed, without regard to specificity or purpose to be used." Appellants' Jurisdictional Statement, at 13. And, the appellants also state that: "the entire process need not operate under a court's order, control or direction, but, due to the overhanging threat of criminal punishment, is *self-enforcing.*" Appellants' Jurisdictional Statement, at 12. This last statement is a reference to the fact that Section 63(8) provides that: "If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor."

While it is true that Section 63(8) provides for such a sanction, it is hardly correct that this leaves a subpoenaed party without judicial protection.

Whenever a subpoena duces tecum is issued, the subpoenaed party has the right, under Section 2304 of the CPLR, to make a motion in court for an order quashing, modifying or fixing conditions with respect to such a subpoena. This motion must be made before the return date of the subpoena. No such motion was made by Lawrence Moskowitz in this case. His deliberate failure to exercise this right hardly entitles him to claim that the "entire process" is unconstitutional because it "need not operate under a court's order."

Moskowitz not only failed to make a motion to quash the subpoena, he also failed to comply with the subpoena by

producing the books and records subpoenaed on the return date of the subpoena. It was because of his deliberate choice not to seek judicial intervention, but, instead, to ignore the subpoena's command, that Moskowitz could have been proceeded against criminally without prior judicial scrutiny of the subpoena. In fact, this possibility did not occur.

The Deputy Attorney General did not proceed against Moskowitz criminally, but merely asked a justice of the Supreme Court of Rockland County to enter an order directing Moskowitz to comply with the subpoena. Moskowitz, therefore has no standing to complain about the constitutionality of what might have, but did not, happen to him. *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295 (1945); *Coffman* v. *Breeze Corp.,* 323 U.S. 316 (1945); *Voeller* v. *Neilston Warehouse Co.,* 311 U.S. 531 (1941); *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118 (1939); *Aikens* v. *Kingsbury,* 247 U.S. 484 (1918).

Moskowitz, in opposing this motion made several challenges to the legitimacy of the subpoena, including a challenge to its reasonableness, claiming that the Deputy Attorney General was, without justification, engaged in a "fishing expedition." Under federal law, it is clearly not required that a governmental agency or body issuing a subpoena duces tecum have any factual basis for believing that its investigation will disclose evidence of wrongdoing. As this Court said discussing the subpoena power of the Federal Trade Commission:

> It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analagous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. *Morton Salt Co.,* 338 U.S. 632, 642-43 (1950); *accord, United States* v. *Bisceglia,* 420 U.S. 141, 148 (1975); *United States* v. *Powell,* 379 U.S. 48, 57 (1964). Under state law, however, the New York Court of Appeals has required that whenever a non-judicial subpoena is issued by a governmental agency, that agency must show some factual basis for believing that the law is being violated. *Myerson* v. *Lentini Moving & Storage Co.,* 33 N.Y.2d 250 (1973). The appellants argued before the lower court that such a factual showing was required in this case.*

The lower court agreed and found that such a factual basis existed, based upon several specific allegations of wrongdoing which had already been brought to the attention of the Deputy Attorney General prior to the issuance of the subpoena. The appellants chose to abandon their challenge to the relevancy of the subpoenaed materials to the Deputy Attorney General's inquiry by directly appealing the lower court's decision to the Court of Appeals solely on the ground that Section 2305(c) of the CPLR and Section 63(8) of the Executive Law are unconstitutional. It is therefore remarkable that the appellants assert in their jurisdictional statement that: "The statutes challenged herein authorize the appellee to take possession of any books and records that are subpoenaed, without regard to

* The Deputy Attorney General has successfully argued in other cases that this requirement for a factual showing is not applicable to an inquiry such as the one authorized by Executive Order 36 for the purpose of advising the Governor about conditions in an entire area of health care, rather than for the purpose of exposing violations of the law. *Matter of Friedman* v. *Hi-Li Manor Home for Adults,* 42 N.Y.2d 408 (1977); *Matter of Hynes* v. *Lefkowitz,* 62 A.D.2d 365 (1st Dept. 1978).

specificity or purpose to be used." Appellants' Jurisdictional Statement, at 13.

The gravamen of the appellants' challenge to the constitutionality of Section 2305(c) of the CPLR and Section 63(8) of the Executive Law is that they permit the Deputy Attorney General to retain possession of subpoenaed materials for a reasonable period of time for the purpose of his inquiry, without requiring a showing of probable cause.* The appellants claim that this violates the Fourth Amendment prohibtion against unreasonable searches and seizures. This claim is without substance.

In *Hale* v. *Henkel,* 201 U.S. 43 (1905), this Court recognized that a subpoena duces tecum, by its very nature, requires the party subpoenaed to produce evidence for use by a fact-finding body and that it requires that he relinquish custody of the evidence for a reasonable period of time for that purpose. This Court reasoned that the similarities between the results achieved by a subpoena duces tecum and a search warrant require that the "reasonableness" standard of the Fourth Amendment be applied to a subpoena duces tecum. *Id.* at 76.

This Court has clearly and consistently followed its reasoning in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena

* Section 2305(c) of the CPLR provides that a court shall determine what period of time is reasonable by considering:

(i) the good cause shown by the issuing party,

(ii) the rights and needs of the person subpoenaed, and

(iii) the feasibility and appropriateness of making copies of the material.

CPLR 2305(c).

duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208-09 (1946).

Justice McKenna, in a concurring opinion in *Hale* v. *Henkel,* disagreed with even this limited application of the Fourth Amendment to a subpoena duces tecum. He pointed out the vast dissimilarities between a search and seizure, which is by its nature forcible, and a subpoena which depends upon voluntary compliance under court supervision. *Id.* at 80-81. However, he acknowledged that both achieved the same result: the temporary dispossession of the owner's property. Yet, as he stated, this dispossession could be limited by a court to the minimum extent required for the purpose of the inquiry being conducted:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of the parties, or subject them to more inconvenience than the demands of justice may require.

Id. at 80.

This language is a resounding endorsement of the statute which the appellants challenge, since they explicitly require that New York courts consider the rights and legitimate needs of the subpoenaed parties and the needs of the party issuing the subpoena in determining what period of possession is reasonable. Federal courts have done this without specific statutory guidelines. See *F.T.C.* v. *Standard American, Inc.,* 306 F.2d 231, 235 (3d Cir. 1962).

The appellants are apparently willing to concede that it is constitutionally permissible for a grand jury to retain subpoenaed evidence for a reasonable period of time for the purpose of its inquiry. They cite *In re Horowitz*, 482 F.2d 72, 75 (2d Cir. 1973) (FRIENDLY, J.) as authority for this. Appellants' Jurisdictional Statement, at 8-9. However, they argue that it is unconstitutional for a non-judicial subpoena to be used to obtain temporary possession of subpoenaed materials without a showing of probable cause. They do attempt to explain the constitutional distinction between a grand jury subpoena and a non-judicial subpoena. They merely state that: "Research has failed to disclose any precedent for New York's new non-judicial subpoena duces tecum, either in this State's jurisprudence or in the jurisprudence of any other sovereign." Appellant's Jurisdictional Statement, at 8-9.

The appellants have apparently chosen to ignore the cases cited by the Deputy Attorney General in his brief to the Court of Appeals. These cases clearly recognize the right of a governmental agency issuing a non-judicial subpoena duces tecum to have temporary possession of the subpoenaed materials for the purpose of its inquiry. *United States* v. *United Distillers Products Corporation*, 156 F.2d 872, 874 (2d Cir. 1946) ("The only real question is as to the reasonableness of the requirement [of the subpoena] that defendant leave at the tax office in Hartford, twenty-five miles away, its books containing its current as well as past accounts for an investigation of possibly four months duration." Held: It is reasonable.); *McGarry* v. *Securities and Exchange Commission*, 147 F.2d 389, 393 (10th Cir. 1945) ("Finally, we do not think the district court erred in not specifying the period

of time during which the Commission might examine the documentary evidence called for in the subpoena."); *Wirtz* v. *Local No. 502*, 217 F.Supp. 155, 156 (D.N.J. 1962) ("The Secretary or his designated representatives shall be given the right to inspect and retain the original documents requested under the subpoena."); *F.T.C.* v. *Standard American, Inc.*, 195 F.Supp. 801, 802 (E.D. Pa. 1961), *aff'd*, 306 F.2d 231 (3d Cir. 1962) ("The basic issue here, therefore, is whether Section 9 of the Federal Trade Commission Act gives the Commission the authority and power to subpoena the records and having subpoenaed them, take them into their custody for investigatory purposes either in the City of Philadelphia where the respondents' place of business is located, or remove them physically to Washington, D.C." Held: it does.). None of the statutes authorizing the issuance of the subpoenas in these cases explicitly provided, as does the new legislation in New York, that a subpoena duces tecum authorizes the retention of the subpoenaed records. See 26 U.S.C. §7602 [IRS]; 15 U.S.C. §49 [FTC]; 15 U.S.C. §78u [SEC]. The courts necessarily understood that the right of these agencies to have temporary use of the subpoenaed materials was inherent in the very nature of a subpoena duces tecum.

Thus, there is clearly no merit to the Appellants' bold contention that: "The departure of New York from the traditional subpoena duces tecum and the substitution of the new subpoena duces tecum exceeds both Federal practice, the practice of other states and the Constitution." Appellants' Jurisdictional Statement at 15.

In fact, the New York statutes merely codify federal law and practice. Therefore, the appellants' challenge to the constitutionality of these statutes is frivolous.

Conclusion

The appellants' appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-372

LAWRENCE MOSKOWITZ and MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

v.

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Appellee.

REPLY BRIEF
TO APPELLEE'S MOTION TO DISMISS OR AFFIRM APPELLANTS' JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

CASES

AUTHORITIES

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REPLY BRIEF TO APPELLEE'S MOTION TO DISMISS OR AFFIRM APPELLANTS' JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

The statement of the case has been presented to the Court both in Appellants' Jurisdictional Statement and in Appellee's Motion to Dismiss. There are no additions necessary. Three points raised by Appellee require clarification, however.

While it is correct that Appellant Moskowitz "made no motion to quash the subpoena and did not comply with it" [*Appellee's Motion to Dismiss or Affirm* at page 4 (hereinafter, *"Motion to Dismiss"*)], the Court should be aware that he was not under any duty to do so. As the trial court itself stated:

"At the threshold, the Court would note that the Court of Appeals, in the seminal case of *Matter of Friedman v. Hi-Li Manor Home for Adults* (42 NY 2d 408), decided July 7, 1977, has approved the procedural posture adopted by respondents [appellants herein] of awaiting the institution of proceedings to compel compliance and then for the first time raising objection." *Matter of Hynes v. Moskowitz,* 92 M2d 495, 497, 401 NYS 2d 398 (Sup. Ct., Rockland Co., 1977).

Appellee is not heard to complain of the procedural posture now, nor did he then. *Id.*

Next, the Appellee indicates, somewhat confusingly, that the trial court, while ordering compliance with the subpoena of Appellee, "upon a motion by the Appellants, . . . modified its order to direct that the subpoenaed records be produced at the office of the County Clerk to be maintained there while the appellants appealed to the Court of Appeals." *Motion to Dismisss* at 6.

Properly, the motion to the trial court should have been described as a motion for a stay pending appeal pursuant to the automatic stay provisions of Civil Practice Law and Rules [CPLR] §5519(c). Such a stay requires the designation of a depository for the property concerned and this is what the trial court did to effect the requested stay pending appeal.

Lastly, Appellee has chosen to acquaint this Court with the showings made to the trial court to support the issuance of the subpoena. *Motion to Dismiss* at 5. The validity of issuance was not challenged below and is not questioned here. The inclusion of this long paragraph from the lower court opinion is, therefore, utilized solely for shock value. Suffice it to say that the dates of the events alleged therein are for periods of time *subsequent* to the dates covered by the request for books and records in the subpoena.

In all other respects, the facts are as presented to this Court.

POINT I

THE WITHIN APPEAL IS NOT MOOT

Appellees argue that since the books and records have already been turned over to the Deputy Attorney General, the issues raised herein are moot. *Motion to Dismiss* at 8. No other citation for this unique interpretation of mootness principles is proffered other than a suggested comparison to *DeFunis v. Odegaard,* 416 US 312 (1974).

This attempt to defuse a potentially damaging determination has been tried by Appellee before. In the case of *Maison & Co. v. Hynes,* 50 AD 2d 13 (1st Dept., 1975) the Appellate Division was faced with the identical argument by Appellee herein following the failure of a court below to issue an order for a stay pending appeal. The subpoenaed books and records were then surrendered (to a Grand Jury). Thereafter, on appeal, a motion to dismiss on the grounds of mootness was made. It was denied by that appellate court.* *In Re: Maison & Co. (Hynes),* 174 NYLJ 77, October 20, 1975, p. 5, col. 1.

Mootness is a singularly improper argument in the case at bar. Appellee still holds the books and records of Appellants. A decision by this Court in favor of Appellants would bring the return of those books and records.

Moreover, such a decision would then allow the Appellants to make proper protective motions to suppress any evidence so obtained.

Both on the law and on the facts the case at bar is not moot. Just recently, in a similar case, the court, though dismissing for want of a substantial federal question, did not accept the mootness argument of Appellee. *Far*

*A copy of the first page of Appellee's brief to the court is appended hereto as Appendix I. It clearly indicates the related state of affairs.

Rockaway Nursing Home v. Hynes, 78-276, ____ US ____, 24 CrL 4036 (October 10, 1978).*

POINT II

A SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED.

Appellee has devoted the majority of his motion to arguing that the current New York practice of allowing a prosecutor, operating solely independent of and without a Grand Jury, to seize possession of subpoenaed books and records is not more than coordination with existing federal law.

> "In fact, the New York statutes merely codify federal law and practice. Therefore, the appellant's challenge to the constitutionality of these statutes is frivolous." *Motion to Dismiss* at 17.

Yet, undisputed and untouched stands Appellants' original assertion:

> "Compare the powers of Federal prosecutors. Under federal law it is only a *Grand Jury* which may take possession of documents subpoenaed under a subpoena *duces tecum. In Re: Horowitz,* 482 F.2d 72 (2nd Cir., 1973). Moreover, this is not an explicitly stated statutory power, but one which is implied. *There is no federal rule which permits federal prosecutors not operating under the unique powers of the Grand Jury to take possession of documents called for under a subpoena.* The only independent power of a federal prosecutor to even subpoena records is found in the Federal Rules of Criminal Procedure, Rule 17 (c). Under that rule, only the Court may permit an inspection before *itself,* by *both* parties, either prior to trial or prior to their admission into evidence of documents subpoenaed. It is important to note that this scheme is *reciprocal,* available to either party equally, and entails no Sixth Amendment problems. This is not the case in the New York statutes, which, rather than conforming themselves to federal law, create new law by allowing a prosecutor, in a non-reciprocal situation, to subpoena and take possession . . . without the order of the Court, for extended periods of time." *Jurisdictional Statement,* at page 12 [emphasis supplied].

*The issues raised in *Far Rockaway Nursing Home v. Hynes, supra,* related to a Grand Jury subpoena *duces tecum,* however, not a non-judicial office subpoena such as the one at bar. The powers of the Grand Jury are not present in this case and Appellee's silence on this point validates the distinction.

In this light, Appellee's expressed desire to take solace in cases dealing with administrative agencies is understandable. However, just as above, Appellee has failed to counter the arguments of Appellants and indicate to this Court why the powers of such agencies should in any way be analagous to his.

Judge Jasen, an ardent supporter of Appellee's position throughout the judicial history of the new statute and the author of the decision appealed from below, stated the thesis most succinctly:

> "The fact that, in several instances, the Legislature explicitly conferred upon established regulatory agencies the authority to audit the books and records of the enterprises to be regulated, is scarcely relevant to this case. We do not deal here with regulatory agencies, whose jurisdiction is very limited, but with the office of the Attorney General, and his power and duty to investigate into matters touching the public peace, safety and justice. There are obvious differences between the statute authorizing exceptional investigation and statutes authorizing regulatory agencies to conduct positive audits." *Windsor Park Nursing Home v. Hynes,* 42 NY 2d 243, 397 NYS 2d 723, 726 (1977) [*Jasen,* J., dissenting]

A new argument now surfaces in its stead. The court is now to equate the powers of Appellee with the powers of Congress *itself. Motion to Dismiss* at 9. Separation of Powers is thrown to the wind as Appellee argues that since one of the functions of the Executive Law is to recommend legislation then surely the deputies of his Attorney General must possess investigative power equal to that of the Legislature.

This argument, almost too incredible to take seriously, is curious in that it overlooks the fact that Appellee's function is of special *prosecutor,* and that, unlike the Legislature he can prosecute and convict on the information he receives. That Appellee wears two hats is manifest. Yet just as true is that they are worn *simultaneously,* not separatively.

It is with the same aplomb that Appellee sidesteps the misdemeanor portion of Executive Law §63(8). He argues:

> "While it is true that Section 63(8) provides for such a [criminal] sanction, it is hardly correct that this leaves a subpoenaed party without judicial protection." *Motion to Dismiss* at 11.

Appellee then continues on to chide Appellant for bringing the threat of criminal sanctions upon himself by failing to move to quash under CPLR §2304. The fact that Appellants are under no duty to move to quash, appears to be beyond Appellee's cognizance. *Matter of Friedman v. Hi-Li Manor, supra, Matter of Hynes v. Moskowitz, supra* (Rockland Co.). Appellee would shift all burdens to Appellants yet readily admit that the subpoena was self-enforcing:

> "It was because of his deliberate choice not to seek judicial intervention, but, instead, to ignore the subpoena's command, that *Moskowitz could have been proceeded against criminally without prior judicial scrutiny of the subpoena.* In fact, this *possibility* did not occur." *Motion to Dismiss* at 12.

This facile transferring of burdens involves constitutional problems which Appellee chooses to ignore. Fortunately, these problems with the new statute have not escaped noted commentators of New York law:

> "The fact that CPLR 2305(c) allows the government to use a subpoena *duces tecum* to compel a person to surrender possession of private papers and records without initially obtaining a court ruling that the request is reasonable, and the fact that it places the burden on the subpoenaed party to challenge the government's demand, raises important questions concerning the constitutionality of the recent amendment." *2A Weinstein-Korn-Miller, New York City Practice,* Par. 2305.6.

In closing, Appellants would only leave the Court with the questions left undisturbed by Appellee and relating to last term's decision in *Marshall v. Barlow's, Inc.,* ____ vs.____ 56 LED 2d 305, 98 S.Ct. 1816 (1978):

> "The 'inspection' of documents to be made in *Marshall v. Barlow's Inc., supra,* was on-premises, and the Court felt that such an inspection required a warrant. This 'inspection, examination and audit' envisioned by Executive Law §63(8) and CPLR §2308(c) takes place off the premises, after the documents have been removed from the custody of their rightful owner. If the on-premises inspection demands a warrant, can the off-premises post-seizure inspection require any less? If the on-premises, non-custodial inspection requires an administrative warrant supplying the requisite showing under *Camara v. Municipal Court,* 387 US 523, 538 (1967) ['that reasonable legislative inspections are satisfied with respect to a particular [establishment]. . . .' *Marshall v. Barlow's, Inc., supra* 3032.] Then, perhaps, a full, probable cause showing should be required of Appellee, whose powers are both

civil and criminal, and who seeks to take possession of the documents to be inspected and bring them back to his office." *Jurisdictional Statement* at 16.

In conclusion, we believe that the issues raised by the statutes questioned herein are of substantial importance to the State of New York and other jurisdictions as well. They create a situation unique to both federal and state practice. Appellee now possesses greater powers than the United States Attorney and may utilize those powers without judicial intervention. The jurisdiction of this Court is proper and the questions presented appropriate for review.

The motion of Appellee should be, in all respects, denied.

Dated: New York, New York
October, 1978

Respectfully submitted,

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APPENDIX 1

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
MAISON & CO.,
Petitioner-Appellant,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,
Respondent.

RESPONDENT'S BRIEF

Statement

This is an appeal from an order of the Supreme Court of New York County (Lang, J.), entered August 19, 1975, denying a motion brought by Maison & Co. to quash a grand jury subpoena addressed to its bank for the bank's records of the Maison & Co. account for a four-month period. In an order entered September 23, 1975, this Court denied Maison & Co's motion for a stay pending appeal. After this stay was denied, the bank supplied the subpoenaed records to the Deputy Attorney General. The respondent then moved in this Court for an order dismissing this appeal as moot. This motion was denied in an order entered October 16, 1975.